AN EPITOME

OF

REAL PROPERTY LAW,

FOR THE USE OF STUDENTS.

BY

W. H. HASTINGS KELKE, M.A.,

OF LINCOLN'S INN, BARRISTER-AT-LAW,
AUTHOR OF "AN EPITOME OF PERSONAL PROPERTY,"
"AN EPITOME OF ROMAN LAW," ETC.

"Quædam collegi et apposui ad juvenum informationem."
Perkins' Profitable Book.

"To them that bee not learned in the Lawe of the Realme this Treatise is specially made." *Doctor and Student.*

THIRD EDITION.

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TO

THE HONOURABLE

SIR JAMES CHARLES MATHEW, KNT.

ONE OF THE JUDGES OF THE HIGH COURT OF JUSTICE

AND

MEMBER OF THE COUNCIL OF LEGAL EDUCATION

This Treatise

IN ADMIRING RECOGNITION OF HIS EFFORTS IN THE

CAUSE OF LEGAL EDUCATION

WITH HIS LORDSHIP'S KIND PERMISSION

IS MOST RESPECTFULLY DEDICATED

PREFATORY INTRODUCTION.

This little work is not intended to supplant any of the larger manuals, but to be read along with them, or before and after some more copious text-book. Experience has convinced me that the student who attacks a big law book is apt to be appalled by the multiplicity of detail, and the enormous number of cases and statutes. The present work offers him a view of the whole field of Real Property Law, and some other points closely associated with it, in very small compass. It is, in fact, a systematically arranged framework, around and on which he may arrange the more detailed knowledge he acquires elsewhere. I believe the greater part of this volume may be almost learned by heart by many, and be understood by most. The system of "catch-words" has been carried out thoroughly by means of italics, capitals, and inverted commas. Long tables of cases and statutes, so essential to the practitioner, so bewildering to the beginner, have been avoided. The short lists which follow (not precede) the text are meant as an integral part of the course, and as a pattern on which the student may enlarge according to his own discretion and capacity. Marginal headings seem inappropriate to matter so closely condensed; the student who

desires them may, if he pleases, find profit in making them for himself.

Among the large number of works consulted, I must particularly express my great indebtedness to the writings of Joshua Williams, Goodeve, Edwards, and Challis. The shortened Conveyancing forms with which the last Chapter is illustrated are founded on Key & Elphinstone and on Prideaux. A few points of importance or interest I have added out of my own professional experience.

W. H. H. K.

6 New Court,
Lincoln's Inn.

NOTE
TO THE SECOND EDITION.

In bringing this edition down to the present date, correcting various forms of expression, and adding new matter, I desire to acknowledge valuable help afforded by Dr. W. J. Sparrow, of the Northern Circuit.

W. H. H. K.

April 1899.

NOTE
TO THE THIRD EDITION.

The last three years have produced little to add to an elementary work, but various cases have been referred to, by name or otherwise.

W. H. H. K.

October 1903.

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ABBREVIATIONS.

GENERAL.

C. A. . .	Conveyancing and Law of Property Acts, 1881-92.
Ch. D. .	Chancery Division.
C. L. .	Common Law.
C. L. P. A. .	Common Law Procedure Act, 1852.
C. O. .	Central Office.
C. q. t. .	Cestui que trust.
Co. Litt. .	Coke upon Littleton.
Cop. A. .	Copyhold Acts, 1894.
J. A. .	Judicature Acts, 1873, 1875.
L. P. A. A. .	Law of Property Amendment Act, 1859.
L. T. A. .	Land Transfer Acts, 1875, 1897.
M. W. P. A.	Married Women's Property Act, 1882-93.
R. P. A. .	Real Property Act, 1845.
R. P. L. A. .	Real Property Limitation Acts, 1833 & 1874.
Semble .	"It seems," *i.e.*, as probable effect of decision.
Secus .	Otherwise.
S. L. A. .	Settled Land Acts, 1882-1890.
St. . .	Statute.
T. A. . .	Trustee Act, 1893.
V. P. A. .	Vendor and Purchaser Act, 1874.
W. A. .	Wills Act, 1837.

IN REPORTS.

A. C. & App. Cas.	Law Reports, Appeal Cases.
Bea. . .	Beavan.
D. G. J. S. .	De Gex, Jones & Smith.
Eq. . .	Law Reports, Equity.
K. B. . .	Law Reports, King's Bench Division.
P. D. . .	Law Reports, Probate Division.
P. Wms. .	Peere Williams.
Q. B. D. .	Law Reports, Queen's Bench Division.
Rep. . .	Coke's Reports.

Salk. . .	. Salkeld.
S. L. C. .	. Smith's Leading Cases.
T. C. . .	. Tudor's Conveyancing Cases.
T. L. R. .	. Times Law Reports.
W. & T. .	. White and Tudor.
W. R. . . .	. Weekly Reporter.

IN CONVEYANCING FORMS.

Absoly . .	absolutely.	mgee .	mortgagee.
accg . .	according.	nominon .	nomination.
admors *or* ads .	administrators.	partarly .	particularly.
appt . .	appoint.	pchase .	purchase.
appmt . .	appointment.	pform .	perform.
conson . .	consideration.	pposes .	purposes.
conted . .	contained.	psuance .	pursuance.
covt . .	covenant.	pon . .	person.
Cy . . .	County.	ponal .	personal.
decld . .	declared.	posson .	possession.
determon. .	determination.	ppy . .	property.
dflt . .	default.	pd . .	paid.
discron . .	discretion.	pt . .	part.
dth . . .	death.	premes .	premises.
efft . . .	effect.	provons .	provisions.
enablg . .	enabling.	remer .	remainder.
este . . .	estate.	revon .	reversion.
exors *or* exs .	executors.	resue .	residue.
hby . . .	hereby.	recet. .	receipt.
hrds . .	hereditaments.	reprive .	representative.
hrs . . .	heirs.	respive .	respective.
hrof . .	hereof.	respy .	respectively.
hrunto . .	hereunto.	sd . .	said.
hinbefore . .	hereinbefore.	survor .	survivor.
hinafter . .	hereinafter.	surrer .	surrender.
intt . . .	interest.	satisfon .	satisfaction.
Indre . .	Indenture.	thrunder .	thereunder.
legy . .	legacy.	togr . .	together.
limon . .	limitation.	trees. .	trustees.
mner . .	manner.	unexped .	unexpired.
mrrge . .	marriage.	Whas .	Whereas.
mge. . .	mortgage.	whof .	whereof.

AN EPITOME

OF

REAL PROPERTY LAW

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CHAPTER I.

PROPERTY.

THE term "property" means (1) right of ownership, or (2) things owned. Rights of property are *primary* rights *in rem*, *i.e.*, availing against all the world and not arising out of wrong.

Property in sense (1) is absolute (*dominium*), or qualified (*sub-dominium*). Ownership, to be in the fullest sense absolute, should be "indefinite in user, unrestricted in disposition, unlimited in duration" (*a*). But any civil society must impose checks on such a right, in accordance with the principle of the maxim *sic utere tuo ut non lædas alienum*. The ownership of a movable approximates very close to the type of

(*a*) Austin.

absolute ownership. What is called in English law an "estate in fee simple" in land, also in practice approximates to this type, though in theory, as derived from the feudal system, there is no such thing as ownership of land by a subject.

Qualified ownership is illustrated by right of common over, or of rent charge on, land of another. Such rights are strictly limited and definite.

The rights of a tenant for life are larger and more indefinite. Hence he resembles an absolute rather than a qualified owner. In the Settled Land Acts he is called a "limited owner." The kinds of ownership considered with reference to their greater or less limitation, are said to vary in *quantity*.

Ownership may also be divided according as it is in *possession* or *expectancy* (*i.e.*, present or future); and further, it admits of *severalty* or *community* (*i.e.*, single ownership or co-ownership). Both these divisions are commonly said to vary in *quality*.

The last great division is into *legal* and *equitable* estates, according as the owner holds the property in his own name or another holds it in trust for him.

Property in sense (2) admits a natural division into things *movable* and *immovable*; but the principal division in English law is into things *real* and *personal*

—a division which nearly, but not quite, agrees with that into immovable and movable. Along with the classes of things real and personal, it is convenient to consider a class of things *mixed*, and one of things *notional*. "Real" is a comparatively modern term; the older phrase was "lands, tenements, and hereditaments." But the modern term is derived from the old remedy for dispossession. The person wrongfully dispossessed of land could bring a *real* action, *i.e.*, claiming the thing (*res*) itself. The person wrongfully dispossessed of goods could once only bring an action for damages against the *person* of the wrong-doer. The corresponding term "personal" has nearly supplanted the older name "goods and chattels."

The differences, practical and theoretical, between real and personal property are chiefly these;—(1) the kinds of ownership of real in point of *quantity* are called *estates;* in personalty only is there legal ownership, and not estates; (2) some modes of transfer (*e.g.*, feoffment) are appropriate only to things real, others, (*e.g.*, assignment) to things personal; (3) he who takes benefit of realty under will is *devisee*, beneficiary of personalty is *legatee*, either kind of property (since 1897) generally vesting on testator's death in executor, and passing through him indirectly to devisee or legatee; (4) on intestacy similarly realty in many cases passes through administrator to *heir*,

personalty to *next of kin ;* (5) personalty is liable as *assets in priority* to realty for payment of deceased's debts, unless he has himself otherwise provided. The differences were formerly greater; on death of intestate before L. T. A., 1897, realty (not personalty) vested directly in heir, the law "casting" the inheritance on him, while under will it vested directly in devisee; also before Finance Act, 1894, "probate duty" was payable on personalty only, but *Estate Duty* which has superseded it is payable on realty also.

Real property comprises (1) immovables (except leaseholds); (2) incorporeal hereditaments; (3) personalty "notionally" converted, *i.e.*, ordered to be laid out in buying land; (4) a very few cases of company shares, *e.g.*, in the New River and the Avon Navigation Companies.

Personal property comprises (1) movables; (2) leaseholds; (3) realty "notionally" converted, *i.e.*, ordered to be sold, and thus turned into money.

Certain things are conveniently described as *mixed, i.e.*, real or personal according to circumstances, or at different times. These comprise (1) trees (real while standing, personal when severed); (2) emblements, or *fructus industriales,* which on intestacy pass as personalty, but under a will generally as realty; (3) fixtures, which, if *domestic, ornamental,* or *trade* fixtures, may be removed by tenant for life or years

or by personal representative, and, if *agricultural*, can, under Agricultural Holdings Act, be generally removed by tenant on notice to landlord, but which in other cases become legally annexed to the realty; (4) animals *feræ naturæ*, which, while such in a park, &c., are subject to qualified property and descend as realty, but if confined in a house, cage, &c., become, while so confined, absolute personal property, and on the owner's death devolve as such; (5) title-deeds, which naturally go with the inheritance, but may be deposited by way of mortgage, and in the hands of mortgagee are for the time being personalty; (6) heirlooms, *i.e.*, movables which by *special custom* go with the inheritance to heir or devisee, but which the owner can during his lifetime sell, when they become pure personalty in the hands of the purchaser. Similarly with "*ensigns of honour*," *i.e.*, family armour or banners hung up in churches, and *deed boxes* in which title-deeds are wont to be kept. N.B.—The term *heirlooms* is often, less properly, applied to "settled chattels," *i.e.*, plate, pictures, curiosities, &c., vested in trustees to go (for as long a period as the law allows) with a family mansion, estate or title. Settled chattels differ from heirlooms, because (1) their devolution does not depend on special custom, (2) the limited owner cannot at C. L. sell them, (3) if the trust is not renewed from time to time, some one becomes absolute

owner, and can then sell or devise them apart from the land.

"Notional things" is a phrase admitting of two meanings, *things* (I.) which physically resemble realty, while in contemplation of Law personalty, or *vice versâ;* or (II.) *acts* forming the subject of a right.

(I.) includes:—(A) things seemingly real, legally personal; *e.g.*, (1) *partnership* lands as between partners themselves, or between them and representatives of a deceased partner; (2) *mortgagee's* interest in mortgaged lands, which on his death vests in his personal representative; (3) *creditor's* interest in judgment debtor's land taken by *elegit*, which devolves similarly: (4) land notionally *converted:* (B) things seemingly personal, legally real; *e.g.*, (1) money notionally *converted;* (2) "*capital* money" arising from sale of land under S. L. A.; (3) sale money of land compulsorily sold to Railway and other *Companies* under Lands Clauses Act, &c.; (4) sale money of land of *Infants* or of *Lunatics* sold by order of Court.

(II.) may be illustrated in regard to personalty by *copyright* and *patents;* in realty by *Advowson* (*i.e.*, right to present to a benefice), and *Franchise* (*e.g.*, right to levy tolls for ferry or market, &c.).

The older name for Realty, viz., "land, tenements, and hereditaments," comprises three terms which are not co-extensive.

"Land" generally includes the earth with all above it *usque ad cœlum* (hence, a lake or pool "is so much land with water on it") (*b*), and *usque ad inferos* (hence, grant of land without reservation carries minerals). Exceptions: (1) "Royal mines," *i.e.*, of gold and silver; (2) timber and minerals on copyholds; (3) Railway lands taken under compulsory purchase, which does not carry minerals, except by express grant.

In several modern statutes, *e.g.*, C. A. and S. L. A. "land" is defined so as to include (generally speaking) any interest therein.

"Tenement" is wider, including (1) land; (2) profits *à prendre* (*i.e.*, rights of common, &c.); (3) offices for life—in short, all things capable of tenure. In deeds it often has its popular sense, *i.e.*, a house.

"Hereditament" is the widest term, including (1) land and tenements; (2) heirlooms (not settled chattels); (3) *conditions* annexed to an estate, *e.g.*, right of landlord in certain events to re-enter; (4) titles of nobility—in short, all things capable of inheritance. Hereditaments are (1) corporeal, carrying right of immediate or future possession of land, or (2) incorporeal, not carrying such right; but the distinction is now of little practical importance.

(*b*) Water *per se* is incapable of property as realty; grant of *water* merely conveys fishing rights.

Still the name "incorporeal hereditaments" is convenient for grouping together the various kinds of qualified ownership, as these do not consist in any right of possession of land. In its older sense, this term included also rights of *future* possession (*e.g.*, remainders), which were said to "lie in grant," while corporeal hereditaments, as rights of *immediate* possession, lay "in livery," *i.e.*, were conveyed by actual delivery of such possession (*c*).

(*c*) *v.* p. 142.

CHAPTER II.

TENURE.

The Feudal System, of which traces appear under the later Saxon kings, was developed under Norman rule, and forms the foundation of Real Property Law. In its English form there was no allodial land (*i.e.*, subject to private ownership): "the king of Domesday is the supreme landlord; all the land of the nation, the old folkland, has become the king's; and all private land is held mediately or immediately of him" (*a*). The folkland (*publicus ager*) was thenceforth "Crown land" (*Terra Regis*), which the king could grant to his subjects till Crown Lands Act, 1702, restrained the practice. All other land was considered to be held of the king as lord paramount; those who held of him directly being tenants *in capite*, below whom were generally various *mesne* lords, while, last of all, in actual occupation, no man holding of him, was the tenant *paravail* (or terretenant). No subject was, or (in theory) even now is, *owner* of land; he is at most a *tenant* holding an *estate* in land. For so holding he had to

(*a*) Stubbs.

render to his immediate superior "services," which might be the doing of certain acts, or a money payment. When these services were worthy of a freeman, the estate was frank tenement (*liberum tenementum*), or freehold. Where the services were "base," there was *base* tenure or tenure in *villeinage*, even if the tenant was personally free. As for farmers or other occupiers of land not having estates of such free or base tenure, they were deemed to have no estate at all; their interest was merely personal as bailiffs or as licensees. Feudal possession of freehold was *seisin*. The tenant's interest, never shorter than his own life, was a *fief* or *fee*—a term afterwards confined to estates of *inheritance*. Where the estate was only for the tenant's life, he was said to be "seised in his demesne (*in dominico suo*) as of freehold;" where it was of inheritance, descending on the tenant's death to his heirs, he was said to be "seised in his demesne as of fee." Thus "tenure" is the fact or relation of holding; "estate" is the *quantum* of tenant's interest.

Freehold tenure was further divided into (1) Knight Service, and (2) Free Socage: (1) including various kinds of military service or money commutation ("escuage") for it: (2) comprising the holding on non-military services, *e.g.*, personal services of an *agricultural* kind, *money* payment not as escuage,

or mere oath of *fealty*. The St. of Tenures (12 Car. II.) turned Knight Service into Free Socage. The feudal incidents of tenure of freehold still surviving are (1) *escheat* on failure of heirs (always to Crown as lord paramount, unless proof that lands are holden of mesne lord), and, where lands are parcel of a manor, occasionally (2) a small *chief-rent*, with (3) *relief* (*i.e.*, one year's rent on succession to deceased tenant), and still more rarely (4) a *heriot* (*i.e.*, best beast, or other chattel, or money payment in commutation thereof). Also the purely nominal incidents of (1) oath of *fealty* (never exacted), (2) *forfeiture* on neglect of services, and, where lands are parcel of a manor, (3) *suit of Court*, *i.e.*, attendance at Court Baron of manor.

Besides ordinary freeholds, there are six of peculiar tenure, viz., Grand Serjeanty, Petit Serjeanty, Tenure in Burgage, Ancient Demesne, Gavelkind, and Frankalmoign.

1. Grand Serjeanty is a relic of Knight Service, preserved by Statute of Tenures, consisting in tenure *directly* of the Crown by honorary service in *person*, *e.g.*, being King's Marshal (Duke of Norfolk), King's Champion (Dymoke of Scrivelsby), &c.

2. Petit Serjeanty is a variety of Free Socage, consisting in tenure *directly* of the Crown by service of yielding yearly something *appurtenant to war*, *e.g.*, a pennon (Dukes of Marlborough and Wellington).

3. Tenure in Burgage is the holding of freeholds parcel of an *ancient borough*, which generally held its lands *directly* of the Crown, subject to various local customs, of which the chief is "*Borough English*," *i.e.*, the custom of descent of land on intestacy to the youngest son; sometimes, especially in copyholds of manors, this extends to the youngest daughter, brother, &c., of the deceased. It is probable that this custom is really the oldest form of intestate inheritance, dating from præ-Keltic times.

4. Ancient Demesne is Free Socage tenure in manors which appear in Domesday as Crown lands under Edward the Confessor or William I. The first tenants were possibly enfranchised villeins; until 1833 the tenants had the doubtful privilege of suing and being sued in respect of their lands only in the manor court.

5. Gavelkind is Free Socage subject to custom of gavelkind, chiefly in Kent, where the Law presumes lands to be gavelkind until proof of disgavelling by statute, but also elsewhere, *e.g.*, in manor of Ealing. "Custom of gavelkind" involves (where found in its completeness) five elements, viz., (1) descent to sons or male collaterals (*Re Chenoweth*) *equally:* (2) power of alienation by *feoffment* (*b*) at age of fifteen: (3) *curtesy* (*c*) and

(*b*) *v.* p. 142. (*c*) *v.* p. 57.

dower (*d*) of a moiety only during widowhood: (4) *devisability* of land before St. of Wills: and (5) non-liability to *escheat* for felony, even before 1870. This last is expressed in the doggerel, "The father to the bough, the son to the plough," *i.e.*, the son can keep his lands and plough them after his father is hanged.

6. Frankalmoign was the spiritual tenure by grant to an ecclesiastical corporation, aggregate or sole, to hold without fealty *in liberâ eleemosinâ* under a *general* obligation to say masses and prayers for the souls of the donor and his heirs. At the Reformation the greater part of these spiritual services became "superstitious uses." Frankalmoign was expressly preserved by St. of Tenures. Probably a large part of present glebe and other ecclesiastical lands are really subject to this tenure, but inextricably mixed up with other lands held by "tenure of *Divine Service*," *i.e.*, by *particular* obligation of saying masses and prayers (now prayers only) *pro populo*, or for the parishioners, &c.

A manor is an aggregate of lands of different descriptions subject to seigniory or lordship. These lands are of two kinds, with three subdivisions of the second: (1) *Freehold parcels* held in fee simple by freeholders of lord of the manor, subject to (sometimes) chief-rents, reliefs, heriots, &c., also to

(*d*) *v.* p. 56.

customary descent, and escheat to lord on failure of heirs. (2) Demesne, including (*i*) *demesne lands* proper, with castle, or manor-house, or mansion-house, thereon; (*ii*) Villeins' parcels under modern name of *copyholds;* and (*iii*) *Wastes*, on which both freehold and copyhold tenants have certain right of common (*e*). To each manor was attached a "Court Baron" for freeholders, "a Customary Court" for copyholders, and often a "Court Leet" with minor criminal jurisdiction. These seem to have grown out of one earlier Court, the *halimot.* (Qu. hall-gemote.) The first and last are in general practically obsolete. But it is essential to a manor that there should be a *possibility* of Court Baron, and therefore at least two freeholders of the manor capable of constituting such a Court; otherwise it becomes only a "reputed manor." A collection of several adjacent manors under one lord is an "Honour." Any manor or honour must be as old as *Quia Emptores* (18 Edw. I.).

Copyholds originated with villeins' parcels, held perhaps at first by serfs literally "at the *will* of the lord according to the custom of the manor;" but as early as 1219 there was a distinction between *liber* and *libere tenens, i.e.*, a man without being personally *villanus* might hold land by villein tenure. And at latest from date of Edw. IV., no copyholder could

(*e*) *v.* p. 94.

be ejected except on forfeiture for breach of duty or neglect of services. Copyholds in general date from before *Quia Emptores*, but in some manors by special custom arose by later grant out of wastes with consent of "homage," *i.e.*, tenants themselves in Customary Court. Any such grant newly made since Cop. A. becomes freehold. In all copyholds the seisin of the freehold is in the lord.

The peculiar incidents are chiefly ten, viz. :—(1) fealty; (2) suit of Customary Court; (3) quit-rents; (4) fines and reliefs, by special custom; (5) heriots, also by special custom, but far commoner than in freeholds (due as "heriot *service*" from tenant of particular lands, or as "heriot *custom*" from copyholders in general of manor); (6) escheat to lord on failure of heirs; (7) forfeiture, especially for leasing for more than a year without licence, opening mines, or cutting timber (hence it is said in Sussex, "The oak scorns to grow save on free land," because copyholder has no interest in keeping up timber, while lord cannot come on land to plant or cut without leave); (8) seizure *quousque*, *i.e.*, lord may seize copyholds on non-appearance of an heir, and after proclamation at three successive Customary Courts hold and enjoy profits unless and until he appears; (9) transfer by *surrender* and *admittance*, *i.e.*, surrender by transferor to lord *to use of* transferee, and subsequent admittance of transferee

on payment of fine to lord and fees to steward of manor (N.B.—Formerly both took place in Customary Court, surrender being by delivery of a rod: now, by various statutes such proceedings are transacted out of Court, generally in steward's office, transferor "delivering" office ruler, or the like, by way of symbolic rod); (10) peculiar customs as to *freebench*, *curtesy* (*f*), and *descent* on intestacy. Of these (9) is the most important, necessity of *admittance* being the essential of copyhold tenure. Particular customs of descent may either affect copyholders only, or in some manors extend to the freeholders also.

Under numerous statutes, many manorial rights may be, and often have been, *commuted* into fixed annual payments or lump sums. *Enfranchisement*, converting copyholds into freeholds, has also taken place (1) at C. L. and (2) under many earlier statutes; now (3) under Cop. A., at instance of lord or copyholder. Under this Act, the compensation of lord may be agreed between the parties or awarded by Board of Agriculture (formerly "Land Commissioners"), but the lord continues entitled to *minerals* and *escheat* of enfranchised copyholds. On escheat, forfeiture, or unconditional surrender of a copyhold, the lord may at his option (1) re-grant it as copyhold, or (2) treat it as freehold of the manor.

(*f*) *v.* p. 56.

If copyholder marry lady of the manor, his copyhold estate is in *abeyance* during coverture. If copyholder acquire estate of freehold in *same* land, the copyhold is extinguished.

In some manors (principally those of ancient demesne) are found "Customary Freeholds," perhaps once held by *sokmanni*, a class intermediate between freeholders and villeins. At the present day such tenants are generally a mere variety of copyholders, expressed to hold "according to the custom of the manor," but not "at the will of the lord." In other cases, when their title does not require *admittance* for completion (less probably where they differ from ordinary copyholders only by having right to timber and minerals), they have the seisin and are true freeholders.

CHAPTER III.

ESTATES.

I.—*General.*

REAL property can in theory be only held for an estate; and estates in point of *quantity* are commonly divided into (i) *freehold*, and (ii) so-called "estates *less than freehold*" (more correctly *interests*): (i) is subdivided into (1) estate of *inheritance*, or *fee*, and (2) estate for *life;* (1) is again subdivided into (a) *fee simple*, and (b) *fee tail;* (ii) is subdivided into (1) term for *year* or *years*, and (2) of no certain term, as tenancy *at will* and *at sufferance*. These last interests are liable to determine on very short notice, while an estate in fee simple can only expire when, by failure of heirs direct or collateral, it escheats to the Crown. But most estates may be so constructed as to be liable to abridgment on the happening of some event. An estate, whether in fee simple or less, may be granted on *condition subsequent*, *i.e.*, that on some event (*e.g.*, non-payment of rent, or breach of some covenant) the grantor or his heirs shall have the right to re-enter and *thereby* determine the estate. Any estate less

than fee simple may also be granted by way of *conditional limitation*, *i.e.*, so as to subsist unless and until some event occur, and on the occurrence of such event, then *ipso facto* to determine without any need of re-entry, *e.g.*, grant of Blackacre to A. while he continues unmarried, which may be for his life, and therefore amounts to an estate for life. Words expressive of condition subsequent are "if," "upon condition that," "provided that," &c. Words expressive of conditional limitation are "until," "while," "so long as," &c. A condition may also be *precedent*, *i.e.*, necessary to be fulfilled *before* estate can vest, but tendency of Court is to construe condition in a will, if possible, as subsequent, as being more favourable to devisee (*Re Greenwood*).

The time-honoured example of a conditional limitation (in Coke upon Littleton) is "to A. B. and his heirs, tenants of the manor of Dale," *i.e.*, a grant of lands to be held by A. B. and his heirs so long only as they continue to be *also* tenants of the manor of Dale. This is a determinable fee, but it is not certain that such a grant *by a subject* making the grantee tenant in fee simple under the grantor would be valid since *Quia Emptores* (*a*), and it seems also impeachable as a perpetuity (*b*).

(*a*) *v.* Edwards, pp. 45, 46, and Challis, p. 228.
(*b*) *v.* p. 45.

Other instances of estates liable to abridgment are (1) fee or other estate followed by executory interest (*c*); (2) mortgagee's estate subject to proviso for redemption and reconveyance on repayment of loan; (3) estate by *elegit* of a judgment-creditor until his debt is satisfied out of rents and profits.

An estate of freehold may be defined as an estate in lands of free tenure for uncertain duration. A grant "to A. for 999 years," though longer than any human life, is of *certain* duration, and therefore is an interest less than freehold. So, too, is a grant "to A. for 99 years, if he shall so long live," though here the certain duration is liable to be abridged by A. dying before the end of the term. Estates of freehold are three only:—fee simple, fee tail, and estate for life. The first and third are at least as old as Saxon times, in some shape or other, and are equally found in copyholds. The second is not older than *De Donis* (13 Edw. I.), and by custom is found in copyholds of some manors. But at the beginning of the feudal system, an estate for life seems to have been the commonest. Perhaps for this reason, a grant of land "to A." simply, without words "limiting" or marking inheritance, has always been an estate for life only. It will be convenient to consider this estate first.

(*c*) *v.* p. 73.

II.—*Estate for Life.*

An estate for life is one limited in its inception to the life of the tenant, or of another or others, created (1) by act of a party *inter vivos* or by will, or (2) by Operation of Law. (1) may be in a deed (a) expressly limited to a life, or (b), as shown above, by simple grant without any words of limitation; but in a will only by express or clearly implied limitation for life, since W. A. Thus, "to A. after my heir's death" gives life estate to heir, but "to A. after B.'s death" does not clearly oust the heir during B.'s life. (2) includes (i) Dower, (ii) Curtesy, (iii) "Tenancy in tail after possibility of issue extinct" (*d*). Jointure in lieu of dower arises by act of party. An estate for the life of another or others is called estate *pur autre vie*, and if for more lives than one is often termed "a lease for lives." It arises (a) by original grant or devise, as "to A. for life of B."; (b) by assignment of ordinary life estate, *e.g.*, A. grants Blackacre to B., and B. subsequently assigns his life interest to C., here C. is tenant *pur autre vie*, and B., in both cases, is *cestui que vie*. Further, the grant to A. in (a), or the assignment to C. in (b), may be "to A. (or C.) and the heirs of his body," or "to A. (or C.) and his heirs." If now D. is the heir at the

(*d*) *v.* pp. 56, 57.

death of A. (or C.) during the life of B., D. is said to succeed as *Special Occupant.* In case of a simple grant or assignment without words of limitation, if A. (or C.) die in B.'s lifetime, there is clearly no special occupant. In such case formerly the first comer could seize the land and hold for the rest of B.'s life as *General Occupant.* This unseemly scramble was abolished by St. of Frauds (29 Car. II.); and now by W. A. (1) tenant *pur autre vie* may *dispose* of the residue of his estate by will; (2) if he does not, and it comes to a special occupant, it is *chargeable in his hands* as assets by descent for payment of deceased's debts; (3) if no special occupant, it shall be assets in the hands of the *personal representative,* who, after payment of debts, shall distribute the residue among the next-of-kin. If there is any doubt whether or not the *cestui que vie* is living, the person who would succeed on his death as reversioner or remainderman may, under *Cestui que vie Act,* 1707, obtain from the Ch. D. an order for his production (usually at 12 noon on a given day at the parish church door), and if not produced or accounted for he is taken to be dead.

Any estate for life may come to an end during the lifetime of the tenant for life. It may be assigned to another by *deed* (R. P. A.). It may also determine by (1) *surrender* to the reversioner; (2) by *merger,* as if the tenant for life acquires the

reversion; or (3) by *forfeiture*, formerly by "civil death" through entering a monastery, now either by *outlawry* in criminal cases, or by breach of some condition on which the estate depends. Until 1845, it was such a breach for the tenant for life to attempt to convey by feoffment any greater estate than he really had, whence a feoffment was said to have a "tortious operation," causing forfeiture. This was abolished by R. P. A., and a feoffment, if used at all, is become "an innocent conveyance," transferring just so much estate as the transferor lawfully can and does profess to convey.

For encouragement of agriculture a tenant for life is allowed *Emblements*, *i.e.*, the crops sown by him but reaped after his death belong to his personal estate, and crops sown by tenant *pur autre vie* before, and harvested after, death of *cestui que vie* belong to tenant himself; not so if estate terminate by tenant's own act causing forfeiture. By Apportionment Act, 1870, rent due from tenant for years on lease determinable on death of tenant for life is apportioned, *i.e.*, if he die between two quarter-days, an aliquot portion of the rent for this current quarter goes to his personal estate.

A tenant for life, unless expressly restrained, has a right to *Estovers*, comprising chiefly *plough-bote* (wood for agricultural implements), *hay-bote* (for fences), and *house-bote* (for fuel and house repairs).

On the other hand, he is (unless expressly authorized) liable for *Waste*. Waste is (1) voluntary, (2) permissive, (3) equitable. (1) consists chiefly in pulling down buildings, felling timber, opening mines, quarries, &c., and changing ancient meadow land into arable or *vice versâ*—in short, permanently injuring or altering the character of the inheritance in which the tenant has merely a limited interest. Timber is oak, ash, elm by general custom, and various other trees by local custom (*e.g.*, beech is timber in Bucks, not in Oxon). Timber trees under twenty years are *Germins;* and neither timber nor germins may be cut by tenants for life, except that (a) he may cut germins for *necessary thinning* of overgrown plantations, and (b) on recognized "timber estates" he may *periodically* cut so much as by local usage can be counted as annual fruits of the land so cultivated (*Dashwood* v. *Magniac*). And by S. L. A. tenant for life with consent of trustees or order of Court may cut and sell ripe timber, three-fourths of proceeds going to "Capital money" for benefit of inheritance, one-fourth as rents and profits to himself.

(2) is omission, as non-repair of buildings, for which tenant for life is not liable, unless the duty has been *expressly* cast on him (*Re Cartwright*).

(3) A tenancy for life may be expressly created as "not impeachable," or "dispunishable" for

waste. The tenant is then still liable for equitable waste, *i.e.*, such waste as was formerly forbidden only by Equity, and now by J. A. This is such "malicious or humoursome waste" as destroying or defacing the family mansion, or cutting ornamental timber. But where such tenant for life has thinned or otherwise reasonably cut ornamental timber, as the Court would do, he is entitled to the proceeds (*Baker* v. *Sebright*).

By various Acts, a tenant for life is empowered to borrow public money charged on the inheritance for many useful purposes, *e.g.*, draining, road making, &c.; also erecting, completing, or improving mansion-house. By Settled Estates Act, 1877, very large powers were given to him to be exercised by *leave of Court*, which hitherto had required a private Act of Parliament. But this Act is almost superseded by S. L. A., 1882–1890. Under these Acts, a "tenant for life" is any legal or equitable limited owner or owners *for life* under settlement (including will) for *successive* beneficiaries; and all trustees with present or future *power of sale* over the lands, or *present* power of sale over other lands similarly settled, are "trustees for purposes of Acts."

Under the powers of the Acts, tenant for life may sell or lease, subject generally to *five* conditions:— (1) he must take the *best* price or consideration

reasonably obtainable; (2) he must have regard to the interest of all beneficiaries under the settlement, for whom he is deemed to be acting as *trustee;* (3) he must give *written notice* of at least one month to the trustees (two at least), and to their solicitor (if any); (4) in case of doubt or dispute he or the trustees may *apply to the Court* by summons; (5) he must obtain leave of the trustees or order of Court for sale of the principal *mansion-house* and *demesnes*, and order of Court only for sale of *settled chattels.* The sale-money, with other moneys arising from exercise of the powers of the Acts, is "capital money," to be paid to the trustees or into Court at the tenant's option. But a *bonâ fide* purchaser is protected and not concerned to inquire whether all the conditions have been fulfilled. Capital money is to be (1) invested according to directions of tenant for life; if none given, at discretion of trustees, in *authorized securities* (*i.e.*, authorized by settlement, or Government or trust securities); (2) expended on *authorized improvements* (viz., draining, roads or streets, railways or canals, farmhouses or cottages, &c., as approved by Board of Agriculture, and trustees or Court); (3) discharge of *incumbrances;* (4) *purchase* of other lands to be similarly settled; (5) *payment out* to persons absolutely entitled; and (6) *costs*, which (in action, &c.) may also under order of

Court be raised by sale, mortgage, or charge. An amount not exceeding half annual rental may be employed in *rebuilding* mansion-house; but if the existing mansion-house is used as a farmhouse, or has not more than 25 acres attached to it, it is not within the Acts, and may be sold without leave (1890).

The notice to trustees may be a *general* notice (of intention to sell, lease, exchange, or partition, some day), but they may from time to time require *further particulars*, or accept shorter notice, or waive it (1884). No notice is required for maximum 21 years' (agricultural or occupation) lease; a three years' agreement to lease may be made not under seal. Rent on a mining lease may vary with current price of minerals (1890), and ordinary tenant for life has one-fourth as rents and profits, or if not impeachable for waste three-fourths. On a building lease, there may be peppercorn or nominal rent for first five years. Maximum building lease without special leave is 99 years, mining 60, but such leases for longer terms may be granted with leave of Court, if customary in district, or shorter term difficult to obtain. Even "fee farm rent" (*i.e.*, lease in *perpetuity* on payment of ground rent) may thus be sanctioned. Other powers are given by Act, viz., to *mortgage* for (1) enfranchisement, (2) equality-money (*i.e.*, on exchange or partition),

(3) discharge of incumbrances; *exchange* lands, easements, &c.; *enfranchise* copyholds; *license copyholders* to lease for more than a year; join in *partitioning* settled lands held in community; and sell land and minerals *separately*. On sale of copyholds, they pass by deed (*without surrender*), which steward must enter on rolls, and admit purchaser.

Any provision in a settlement attempting by forfeiture or gift over of the land or even of other property (*Re Smith*) or otherwise, to prevent exercise of the powers under the Acts is void. The powers are *cumulative* (*i.e.*, in addition to any other powers given by the settlement), but in case of conflict between the two, the powers under the Acts prevail. They are not assignable, but, if the tenant assign his life estate for *value*, he cannot exercise these powers so as to affect assignee's rights without his leave, except that (where assignee is not in possession) he can make ordinary and proper leases without such leave.

Several tenants for life of an undivided share (*e*), or even annuitants entitled to *whole* rents of definite portion of estate, make up one tenant for life (*Re Bennet*). If tenant for life or in fee simple is an infant, the powers may be exercised by the *trustees* of the settlement. If tenant for life is a married woman entitled for her separate use, she *alone* can

(*e*) *v.* p. 60.

exercise the powers; if not for her separate use, *she and her husband* together form the tenant for the purposes of the Acts, and can exercise the powers jointly. If tenant for life is a lunatic, the powers are to be exercised by his *committee* under order of Lord Chancellor or Lords Justices sitting in Lunacy.

Most of the large estates of England are in the hands of tenants for life under "strict settlement" (*f*). Apart from these Acts, there is no means of selling such lands or any part of them, however desirable to clear incumbrances, &c., except when the tenant in tail is adult and can disentail, or under a power in the settlement. The tenant in tail is generally an infant, and powers in a settlement were usually given to the trustees. The policy of the Acts is to make adult "limited owners" all but absolute owners as to the lands, but not as to the money derived from them.

III.—*Estate Tail.*

An estate tail is one limited in its creation to a man and the *heirs of his body*. In a deed these words were formerly essential, but now by C. A. "to A. in tail," "tail male," or "tail female," may be used alternatively. In a will, any words expressing intention suffice, *e.g.*, "to A. and his children,"

(*f*) *v.* p. 34.

or "issue," &c. It is "general" where any descendant may inherit, according to order of inheritance (*g*); or "qualified," as *tail male*, to male descendants only, *tail female*, to females only (very rare), and *tail special*, as "to A. and the heirs of his body by his wife B.," and by no other wife, or (in a will) "to A. and his issue male and their male descendants," with gift over on failure of such is special *tail male*.

Originally, addition of the phrase "heirs of the body" created a "fee simple *conditional* at C. L.," *i.e.*, a life estate in the donee to be enlarged into fee simple as soon as heritable issue was born, whether or not issue afterwards lived. Such an estate was therefore inalienable beyond life of donee until birth of issue, but afterwards alienable by subinfeudation. But by *De Donis* [*conditionalibus*] (13 Edw. I.) such estate was converted into estate tail (*i.e.*, *taillé*, cut down to *descendants*, excluding *collateral* heirs), and became wholly inalienable. The origin of estates tail was thus about the end of the 13th century. They continued inalienable for nearly 200 years, till Edward IV., partly to render great estates accessible to forfeiture for treason, partly to please the mercantile classes by rendering such lands liable for debts, encouraged the bringing of *Taltarum's Case* —the foundation of Common Recoveries, by which

(*g*) *v.* p. 54. (Canons 1–4.)

an estate was disentailed. Under Henry VII. and VIII. a less complete disentail by fine was introduced.

A common recovery was a fictitious suit carried to judgment. The chief *actores fabulæ* were the "tenant to the *præcipe*" and the "demandant," the second destined to play plaintiff against the first as defendant. A freehold estate in possession was conveyed to the first by tenant in tail, if in possession, or by him and tenant for life, if this last was in possession. The demandant sued tenant to the *præcipe*, who then "vouched to warranty" tenant in tail (*i.e.*, called on him to show that he had a good title to convey), who in turn vouched the "common vouchee" (generally the Court crier), who took care to disappear for the time, whereupon the Court gave judgment for plaintiff, and ordered the faithless vouchee to find other lands of equal value for the luckless issue of tenant in tail, remaindermen, and reversioner. The vouchee had not any such lands, so the issue, &c., went without, while the successful demandant was bound by a "deed to lead uses" to take the lands for or as directed by tenant in tail, who thus got full power over them (*i.e.*, to hold them in fee simple or convey them to a purchaser). This rigmarole admitted of infinite varieties, and raised many subtle difficulties, *e.g.*, "whether a Papist 'could suffer a common recovery,'" "whether disentailment of New River

shares required separate recovery for every county through which the New River runs," &c.

A Fine was a fictitious action compromised by leave of Court. The end (*finis*) of it was to bar issue, but *not* remainder or reversion, and it was "levied with proclamations" (*i.e.*, proclaimed once in each term for a year in open Court). Instead of fee simple, it created a "*base* fee," lasting only as long as there were issue of tenant in tail, but allowing a remainderman or reversioner to come in upon the extinction of such issue. The Fines and Recoveries Act, 1833, abolished all these fictitious proceedings, and substituted a deed to be enrolled within six months at the C. O., which may (1) convey the now disentailed land to a purchaser, or (2), through a "grantee to uses" (*h*), to tenant in tail himself in fee simple or in base fee. But either (1) the first existing tenant for life *under the settlement*, or (2), by express provision in the settlement, three or less *in esse* jointly (usually the trustees), form a "protector of the settlement," and without his assent, in the same or another previous or co-temporaneous deed also enrolled, only a *base fee* (as formerly by Fine) can be created. Therefore fee simple absolute (as formerly by Recovery) can be created out of fee tail only (1) by tenant in tail in remainder with consent of protector, whether tenant

(*h*) *v.* p. 170.

for life or other or others; (2) by tenant in tail in possession after death of tenant for life with consent of other or others forming protector; (3) by tenant in tail in possession alone, when there is no protector.

A base fee is "enlarged" into fee simple (1) by the ex-tenant in tail executing a subsequent deed enrolled with consent of protector (if any); (2) *ipso facto* by the base fee and immediate remainder or reversion in fee being united in the same holder (*e.g.*, if the reversion is sold or devised to one who has already purchased the base fee); (3) under R. P. L. A., 1874, by twelve years' uninterrupted possession of the base fee after death of the protector.

In three exceptional cases an estate tail cannot be barred:—(1) tenancy in tail after possibility of issue extinct, arising out of tail special and death of the particular wife without issue, such an estate being practically reduced to a tenancy for life; (2) estates tail granted by the Crown for specified or presumed public services, the reversion being in the Crown (*e.g.*, Dukes of Marlborough and Wellington); (3) in very rare cases by private Acts (*e.g.*, Shrewsbury estates).

Tenant in tail in possession being competent to make himself absolute owner is naturally not liable for waste, except that tenant in tail after possibility, &c., is liable for *equitable* waste. The land is liable

in his hands for *judgment* debts, if delivered in execution in his *lifetime* (*i.e.*, by writ of *elegit* delivered to sheriff, or "equitable execution" by appointment of a receiver). It may now be taken that it does *not* by L. T. A. vest in personal representative and so become liable to *all* debts. But it is liable to Crown debts (both in lifetime and as assets after decease of debtor) provided a "writ of extent" has been registered.

Under S. L. A. a tenant in tail *in possession* has the powers of a tenant for life under the Acts. Hence he can at his option (1) sell as tenant for life under the Acts, *preserving* the settlement and merely substituting capital money for the land, or (2) disentail, *destroying* the settlement altogether and becoming absolute owner of the land or its value.

"Strict settlement" is the usual system of "tying up" large estates for as long a time as the law allows, by giving life estates to all living persons and estates tail in remainder thereafter to their unborn sons (or sons first and afterwards daughters) which may be made to vest at birth or at twenty-one. Thus, if made at marriage of eldest son, life estate is reserved to his father; remainder for life to himself; remainder in tail to *his* eldest son; in default of issue of such son, in tail to his second son, &c., along with provisions for jointures for widows and portions for younger children. When

a tenant in tail attains twenty-one, he is usually offered an allowance to be charged on the land, if he will bar the entail and join in the re-settlement by which *he* shall become mere tenant for life, and *his* (unborn) son tenant in tail. Thus no particular settlement lasts much longer than a life or lives in being and twenty-one years after; it then gives way to a new one, and no tenancy in tail falls into possession; no part of the land can ever pass out of the family, except either by sale by tenant for life under S. L. A., or by the united action of tenant for life and his son; in the former case the value, as capital money, continues to represent the land; the latter cannot happen unless prudence or improvidence overmasters pride of family in both father and son; meanwhile incumbrances in the shape of jointures, portions, rent-charges, &c., are accumulating, and the land ceases to be profitable to its nominal owners unless backed up by large personalty.

Quasi-entail is estate *pur autre vie* limited to grantee and heirs of his body. Not being within *De Donis*, it is barred by conveyance without enrolment, but if preceded by life estate, consent of tenant for life is required to defeat *subsequent* remainders.

Copyholds also are not within *De Donis*, and there is no entail in them, except by special custom.

Estate in copyholds "to A. and heirs of his body" in a manor where there is no such custom raises fee simple *conditional* on birth of issue, freely alienable after such birth. Where there is special custom to entail, estate tail, if *legal* (*i.e.*, vested in beneficiary himself), is barred by surrender enrolled on rolls of manor; if *equitable* (*i.e.*, vested in trustee for beneficiary), it is barred (1) by *deed* enrolled in manor, or (2) by *surrender*. The latter is contrary to principle, as trustee, not beneficiary, is the nominal copyhold tenant, but it is authorized by Fines and Recoveries Act. Consent of protector, where required, may be given by (1) deed previous or cotemporaneous enrolled in manor, or (2) concurrence at date of surrender similarly enrolled.

Personalty (*e.g.*, leaseholds, consols, chattels), not being within *De Donis*, does not admit of estate tail. A grant or devise, *e.g.*, of leaseholds to A. and the heirs of his body, vests them in A. absolutely (*Leventhorpe* v. *Ashbie*). Where personalty is comprised in a "strict settlement," the utmost possible by way of "tying it up" is to settle it on trusts to correspond with the freeholds, but so as not to vest absolutely in any tenant in tail *by purchase* till twenty-one, on death thereunder to devolve as the freeholds do. The phrase "by purchase" confines the limitation to those who take under the settlement, and brings the vesting

within the period allowed by the Rule against perpetuities (*i*). Personalty is also sometimes (especially in a will) settled by trust for sale and re-investment in freeholds to be settled like other settled freeholds, with power to postpone sale, and directions for interim enjoyment by persons entitled to the freeholds.

Non-strict settlement is a convenient term for limitation (generally of small estates in land or house or houses, and by *will*) by way of trust for sale for benefit of, *e.g.*, testator's widow for life, and afterwards for equal division among children. It is, in fact, typical will of professional or business man who owns town or suburban house. But it falls within S. L. A., s. 63. This raises difficulty of reconciling two concurrent powers of sale, viz., statutory *power* of widow as tenant for life, and *power clothed with a trust* of trustees. By S. L. A. the former should prevail. This being found inconvenient, by S. L. A., 1884, it was enacted that (1) trustees in such case may sell without consent of tenant for life; (2) such tenant for life may not exercise statutory powers without order of Court; (3) such order may be registered as *lis pendens*, which is notice to all the world that powers of trustees are for time being suspended.

It may be observed that estate tail is the one

(*i*) *v.* p. 45.

purely Norman estate. Proposals have been made to abolish *all* settlements of land. There is, however, a great deal to be said for retaining power of creating a life estate, especially in case of a widow.

IV.—*Estate in Fee Simple.*

An estate in fee simple is one limited in its creation to a man *and his heirs.* In a deed these words were formerly essential, but now by C. A. "to A. in fee simple" may be used alternatively. In a will since W. A. (not before), a simple devise of Blackacre to A., *without* any words of limitation, carries fee simple, provided the testator was seised in fee. A grant in a deed "to A. and his heirs *male*" carries fee simple, the word "male" being mere surplusage, but a devise in a will "to A. and his heirs male" would sufficiently import the intention of giving an estate in *tail male.* The two characteristics of fee simple are (1) that it descends on intestacy to heir or heirs, whether lineal or collateral, subject now, however, to conveyance by administrator or order of Court; (2) that tenant has unfettered power of alienation. Hence it is the highest estate known to the law, and nearest approach to absolute ownership in land, tenant being limited in his enjoyment only by general

policy of law in favour of society, by his own covenants, and by former *restrictive* covenants of which he has actual or constructive notice, *e.g.*, not to build, &c. (*Haywood* v. *Brunswick Building Society*). If the estate is in freeholds, he is not liable for waste, unless there is executory devise or shifting use over, when he is liable for equitable waste only. In copyholds he is liable, and remains so as to minerals, even when they are enfranchised. If lands are held of a manor, even a freeholder may be liable to chief-rents and heriots.

Estates in fee simple were perhaps at first alienable only by the lord's consent. Later they were by *subinfeudation*, grantee holding of grantor, as he in turn held of Crown or mesne lord. But *Quia Emptores* (18 Edw. I.) abolished subinfeudation, and allowed tenant in fee to alienate *inter vivos* to grantee who should hold of superior lord, and not of grantor. Generally, the superior lord has now disappeared, and tenant in fee holds of Crown, except where lands are parcel of a manor, which must be as old as *Quia Emptores*, or thereabouts.

In addition to an ordinary or "absolute" fee simple there are (1) fee "qualified" or "base," and (2) fee "conditional." (1) is subject to some qualification required (a) of the tenant or his heirs, or (b) of the circumstances under which they hold. (1a) appears to be obsolete, except as preceding

executory interests (*k*); an ordinary "base fee," arising out of imperfect barring of an estate tail, is an instance of (1b): an estate "to A. and the heirs of his body" (*i.e.*, restrained to particular heirs) in freeholds before *De Donis*, or now in copyholds of a manor where there is no custom to entail, is an example of (2); mortgagee's estate was also formerly so described.

The unfettered power of alienation secured to tenant in fee simple by *Quia Emptores* was at first only *inter vivos*. The history of devise of land by will may be summed up under six heads:—(1) Power of devise existed in *Saxon* times; (2) it was abolished under the feudal system, except by *Local Custom* in the city of London, in Kent, and some other places; (3) under the later Plantagenets it became usual to convey lands *inter vivos* to the *Uses* to be declared by will, with "resulting use" for feoffor himself during his lifetime; (4) St. of Uses (27 Hen. VIII.) having turned these uses into legal estates not devisable, St. of Wills (32 Hen. VIII.) made all lands in Common Socage devisable, and lands in Knight Service as to two-thirds; (5) St. of Tenures (12 Car. II.), by abolishing Knight Service, made all lands devisable as common socage; (6) St. of Frauds made estates *pur autre vie*, whether or not expressed to be of

(*k*) *v.* p. 73.

inheritance, devisable. If lands are in a "Register County," viz., Middlesex, Yorkshire, or the Bedford Level (*l*), registration of deeds and wills is required in General Land Registry (or local registry) to secure the title of purchaser or devisee against a subsequent purchaser without notice. But by V. P. A. registration by purchaser from devisee under *unregistered* will prevails over *subsequent* registration by purchaser from heir.

Copyholds held in fee simple are conveyed by Surrender and Admittance *inter vivos*, and by Will entitling devisee to admittance, and since 55 Geo. III. it is not necessary for the testator previously to surrender to the use of his will.

The general policy of the Law places certain restraints on alienation of fee simple:—regarding (1) Corporations, (2) Charities, (3) Fraud on Creditors, (4) Fraud on Purchaser, (5) Superstitious Uses, (6) Perpetuities, (7) Accumulation.

1. Corporations cannot hold land except by licence of Crown, being forbidden by Statutes of Mortmain to do so directly (*Magna Charta* and 7 Edw. I.) or by way of use (15 Rich. II.), and now by Mortmain Act, 1888; conveyance to corporation not so licensed works forfeiture to Crown or other superior lord. Licence may regard specific lands, or be general, and is given by charter or statutory

(*l*) *Cf.* also L. T. A., 1897, as to compulsory registration, p. 146.

powers in public or private Act. Under Charitable Trusts Acts, 1853, &c., charity trustees may be incorporated, and may then hold lands without further licence in mortmain. Registered companies under Companies Act, 1862, for acquisition of gain may hold lands for the purposes of the company; companies for other purposes may hold two acres without, and more with, sanction of Board of Trade. By Public Health Acts, 1875, &c., Urban and Rural authorities may hold lands for the purposes of the Acts, and by Commons Act, 1899, a District Council may acquire the fee of a public common. Railway, Tramway, Gas, Water Companies, &c., usually hold under the powers of their private Acts. A corporation holds land "to them and their *successors*."

2. Charities. By Mortmain and Charitable Uses Act, 1888, repealing but substantially re-enacting the so-called "Mortmain Act," 1735, and codifying various later Acts, every assurance of land, or of personalty to be laid out in land, for *charitable uses* is forbidden, except (1) *bonâ fide* conveyances made with proper formalities for *full value* (including thereunder rent reserved) and (2) *gifts* made in accordance with the Act, *i.e.*, by *deed* with two witnesses at least twelve months before death, and enrolled in C. O. within six months after execution, to take effect in possession, without reservation or

power of revocation. Conveyance for value may be within twelve months before death. Stock given for buying land must be transferred at least six months before death. But various charities are by this and other Acts exempted from these restrictions, *e.g.*, the five English Universities and their Colleges; Eton, Winchester, and Westminster; British Museum, Greenwich Hospital, &c.; Dwellings for Working Classes (1890); gift to trustees of society for purposes of religion, art, literature, or science, up to 2 acres, or building for such purposes; public park up to 20 acres, museum 2 acres, elementary schoolhouse 1 acre, and public gymnasium held by local authority (1891). These three last amounts of land may also be devised by *will* twelve months before, enrolled with Charity Commissioners six months after, death. Charity moneys may by Act of 1870 be invested on mortgage, but if by foreclosure or otherwise land is absolutely vested in the charity, it becomes subject to trust for sale, and must be actually sold. By Mortmain Act, 1891, *any devise* to a charity is good, but the land must be sold within twelve months after death, or later by the Charity Commissioners, unless an order of Court direct the contrary. Legacy of stock or money for buying land is good as legacy, if *not* laid out in land. "Impure personalty" (*i.e.*, money derived from sale of land, or secured on land) is *not* to

be deemed land, and may therefore be bequeathed to charities.

3. Fraud on Creditors. By 13 Eliz. c. 5, any conveyance of property (including lands), not on "good consideration" and *bonâ fide*, with *intent* to delay or defraud creditors, is voidable at instance of creditors who can show that settlor, either by being heavily embarrassed at date of settlement, or otherwise, must be taken to have intended fraud. By Bankruptcy Act, 1883, any *voluntary* settlement is void (1) if settlor become bankrupt within *two* years, or (2) if within *ten* years, then unless the parties claiming thereunder prove (a) that at its date settlor was solvent without aid of property settled, *and* (b) that settlor's interest therein passed on execution to trustee of the settlement. And (apart from statutes) though A. may settle property on B. *until* bankruptcy, &c., with gift over thereon, B. cannot so settle property on himself.

4. Fraud on Purchaser. By 27 Eliz. c. 4, any *voluntary* settlement of *land* was void as against a subsequent purchaser for value (buyer, mortgagee, &c.) *with* as well as *without* notice of previous gift. But by Voluntary Assurances Act, 1893, such voluntary conveyance is now valid, if *bonâ fide* and without fraudulent intent.

5. Superstitious uses. These are gifts for purposes which Law deems beneficial neither to par-

ticular person or class, nor to general public, *e.g.*, gifts for saying of masses or prayers for soul of donor or another. Gifts for putting up monument or stained glass window to memory of *donor himself*, or for keeping up the same have been held void, either as tending to a "perpetuity," or as being of nature of "superstitious uses."

6. Perpetuities. The general principle of Law (wholly apart from St.) is to forbid the "tying up" of property so as to render it *inalienable* for more than a life or lives in being and twenty-one years. Or (to express the Rule affirmatively), any instrument providing for future destination of property, real or personal, must so provide that *in any case* it shall ultimately vest under the instrument within a life or lives in being and twenty-one years afterwards, with a further period for gestation where it actually exists. (*Cadell* v. *Palmer*.) Any limitation infringing this Rule is "void for remoteness." The chief application of the Rule is to affect Executory Interests (*m*), and it was probably framed for that purpose when they first became common. It does not prevent creation of estate tail or limitations subsequent thereto, because both it and they may always be destroyed by disentail. And according to the more probable opinion it does not in general affect legal remainders, which are

(*m*) *v.* p. 73.

governed by a different rule (*n*). Where the Rule does apply, any limitation which may *possibly* be too remote (whether or not in the event it happens so to turn out), and every subsequent limitation depending thereon, are *wholly* void; *e.g.*, "devise in trust for A. for life, and after his decease for such of his children as shall attain the age of twenty-one, to vest in them respectively at that age," is good: but "devise in trust for A. for life, and after his decease for such of his children and *grandchildren*, &c.," would be bad, though all the children *must*, and all the grandchildren *might*, attain their majority within twenty-one years after A.'s death; because some of the latter might not. Therefore entire gift to the *class* formed of children and grandchildren would fail.

7. Accumulation. By Accumulations (or "Thellusson") Act, 1800, no accumulation of rents or property, real or personal, may by any instrument be directed for longer than one *or* other (and *one* only) of these four periods, viz., (1) life of settlor, or (2) twenty-one years after, or (3) minority of any person *in esse* at death of settlor or testator, or (4) minority of any person who, if of full age, would under the deed or will be entitled to rents and profits. The meaning of (4) is not very clear; it appears to mean that accumulation may be directed

(*n*) *v.* p. 69.

to *begin* at *birth* of devisee or legatee not *in esse* at death of settlor or testator, but must then cease at twenty-one years from settlor's death. Any accumulation exceeding the lawful period is bad only for the *excess*, which under a will lapses to residuary devisee, if any; if none, to heir. There are three exceptions to which the Act does not apply: viz., (1) provisions for payment of *debts*, (2) raising *portions* for younger children, (3) touching produce of *timber*. If the accumulation is directed for *purchase of land*, it must not, by Accumulations Act, 1892, exceed minority of person entitled.

Sale of "pretenced titles," *i.e.*, of land of which vendor was not in actual possession, was void by an Act of Hen. VIII., but this Act is repealed by L. T. A., 1897.

Such are the chief restraints on alienation imposed by Law. On the other hand, any attempt at *general* restraint of alienation by condition annexed to grant or devise of estate of freehold is void for "repugnancy," for grantor "cannot derogate from his own grant."

Alienation of fee simple, whole or partial, is (I.) by operation of Law, (II.) by act of tenant. (I.) may be (a) by *Bankruptcy*, when the estate vests in trustee in bankruptcy for benefit of creditors; (b) by *Marriage*, when at C. L. fee simple of a woman passes beneficially to her husband, who gains a freehold estate therein during coverture with

inchoate right to "curtesy"—a rare occurrence since M. W. P. A.; (c) by *Execution* by *elegit*, with or without subsequent sale; (d) by *Administration* with order for sale for payment of debts of deceased tenant. Also, as far as personal interest of the tenant goes, on his death intestate his fee simple descends by *Inheritance* to his heir by operation of Law. But this is not alienation, being of the very essence of the estate.

(II.) may be (1) *inter vivos*, and this (a) by *Sale*, (b) by *Gift*, (c) by *Mortgage*, (d) by *Settlement* creating lesser estates out of fee simple, with or without reservation to the settlor himself: or (2) by *Devise*.

Under statutes, ranging from Statute of Westminster the Second (13 Edw. I.) down to Land Charges Act, 1900, land may be "taken in execution" to satisfy a judgment debt. The creditor may (1) become "Tenant by *Elegit*," and recoup himself out of *rents* and *profits*, or (2) may, and generally will, after *registering* writ in the Land Registry, obtain an order, on petition to Ch. D., for *sale* of the lands. Where debtor's interest in land is of a kind that cannot be taken under *elegit*, creditor may (3) have "Equitable execution" by appointment of a *Receiver*. The "return to the writ" of *elegit*, or appointment of a receiver, alike constitutes "delivery in execution" and "*binds*

the land," *i.e.*, creditor's rights prevail over any *subsequent* purchaser for value. Crown debts are recoverable by "writ of *extent*," which, by Crown Suits Act, 1865, on registration, binds lands of debtor. On death of a debtor seised of fee simple, his lands are by Administration of Estates Act, 1833, assets for payment of his debts, *after* personalty is exhausted. He may, however, by his will or otherwise, *charge* all or some debts on his lands *equally* with or in *exoneration* of personalty, but cannot exclude either from liability in case of insufficiency. By Administration of Estates ("Hinde Palmer's") Act, 1869, Specialty creditors have no priority over Simple contract creditors, both in administration being paid *pari passu*. *Secured* creditors, *i.e.*, those who hold some specific charge on lands of deceased *insolvent*, by J. A., 1875, s. 10, are subject to Bankruptcy rule, by which they may (1) *keep* their security without proving, or (2) *give it up* and prove for the whole debt, or (3) *realise* or *value* it and prove for the balance, subject in latter case to giving it up at their own valuation.

A *lis pendens*, *i.e.*, action affecting title to land, may also be *registered*, whereby any subsequent purchaser is affected with *notice* equally as by express notice. The registration may be "vacated" on proper application to the Court.

Persons under "disability" (Infants, Lunatics, Married Women, Convicts) are under complete or partial incapacity of alienation. The will of an Infant is *void*, and his conveyance generally *voidable*. But valid alienation of his land may be made (1) by infant himself, if 15 years old, conveying *gavelkind* lands by *feoffment;* (2) by order of Court for *payment of debts* of testator who devised lands to infant; (3) on *marriage settlement* with sanction of Court, where male infant is 20, or female infant is 17; (4) under S. L. A., by *trustees;* (5) under T. A., by "Vesting Order" in case of *infant trustee* or *mortgagee*.

Conveyance by a Lunatic to *bonâ fide* purchaser, if for value *without* notice of lunacy, is probably *valid* and *with* notice *voidable*. Valid conveyance may in latter case be made by Lord Chancellor, Lords Justices, or committee acting under their direction, under Lunacy Act, 1890, where (1) lunatic is seised of land as *trustee;* (2) alienation is necessary for *benefit of others, e.g.*, creditors; or (3) unless alienation be allowed, estate of lunatic would *seriously suffer*.

A Convict, by Abolition of Attainder Act, 1870, cannot, after *sentence* of death or penal servitude for *treason* or *felony*, alienate lands, but they may be conveyed for benefit of convict's estate by Crown *Administrator*. Aliens, since 1870, can hold any estate in land in like manner as subjects.

The fee simple (or other freehold) of a Married Woman may be to her *separate use* under (1) M. W. P. A., 1882; or (2) settlement, grant, or will to that effect, (a) *with*, or (b) *without, restraint on anticipation*, and (i.) vested in herself (*legal* estate), or (ii.) vested in trustees for her (*equitable* estate). As to (1), she can alienate both legal and equitable (or beneficial) interest by ordinary deed as though she were *feme sole*. As to (2), if restrained from anticipation she cannot, of course, alienate so as to deprive herself of the income. If not so restrained, she can alone convey *equitable* interest (*Taylor* v. *Meads*); and she and her *husband* by "deed acknowledged" (*v. infra*) in case (i.), or she and *trustees* by ordinary deed in case (ii.) can convey *legal* estate.

If her fee (or other freehold) is not to her separate use (*e.g.*, if it vested in her after marriage, but before Jan. 1, 1883), her husband has by C. L. a freehold estate during coverture, carrying right to rents and profits, and neither he nor she can devise the land. By Fines and Recoveries Act, instead of a fine, a deed *acknowleged* after *separate examination* of the wife, with *concurrence* of the husband, is the means of conveying such lands. The separate examination must be before a Judge, or (since C. A., 1882) *one* commissioner.

Interests less than freehold, being "*Chattel* interests in land," and therefore personalty, will be

deferred to chapter ix.; and we now proceed to devolution of fee (whether *simple* or *tail*) on intestacy. As an "investitive fact" by which a successor acquires title to property, Devolution might be considered at a later stage; but as involved in the very idea of estates of *inheritance*, it will be more conveniently considered here.

CHAPTER IV.

DEVOLUTION.

On intestacy of tenant of an estate of inheritance his real estate formerly devolved directly on the person who at his death was his heir. But on death of intestate since 1897, his fee simple in freeholds now by L. T. A. vests in his administrator, by whose conveyance or by Order of Court made after one year from death it passes (after payment of debts thereout, if necessary) to his heir; copyholds, however, still vest *directly* in the heir. The heir is an uncertain person till death of *propositus*, for *Deus, non homo, hæredem facit,* and *Nemo est hæres viventis.* Yet we speak of "*expectant* heirs": viz., an "heir *apparent,*" who must succeed if he outlives his ancestor, *i.e.*, an eldest son; and an "heir *presumptive,*" who must succeed if the predecessor die before any nearer heir is born and survives, *e.g.*, a female only child, brother, nephew, &c. An heir is none the less heir, though all land be devised to another. He is ready to take, if the devise wholly or partially fail. If the land be devised to him, he is both *heir* and *devisee,* but takes as devisee, *i.e.*, by

"*purchase* and not by *descent*," "Purchase" including all taking of land except by Descent, Escheat, Partition, or Inclosure. Besides heir, the wife or husband of deceased may have certain estates in land.

Descent or Inheritance depends originally on General Custom (together with customs of Gavelkind and Borough English), but as to freeholds and copyholds of manors frequently on Particular Custom. The general custom as to freeholds, and as to copyholds so far as no custom of the manor is proved to the contrary, is now embodied with important alterations in Inheritance Act, 1833, together with a clause in L. P. A. A. (Lord St. Leonards' Act), 1859, which is to be read into the former Act. The Canons of Descent may be stated as seven :—

(1) Descent to be traced from *last purchaser*, and not as formerly, according to maxim *Seisina facit stipitem*, from last person actually *seised;* only on *total* failure of heirs of purchaser (by L. P. A. A.) it shall be traced from person *last entitled;*

(2) To issue *in infinitum;*

(3) *Males* being preferred to females, *Primogeniture* among males, *Coparcenary* (*i.e.*, community of inheritance) among females;

(4) Remoter issue "representing" their own parents and taking *per stirpes* (Canons 1–4 obviously exhaust descent of estate tail);

(5) *Nearest ancestor* taking on failure of issue (not, as formerly, collaterals);

(6) *Paternal* ancestors and their issue being preferred to maternal, and *male* maternal to female maternal;

(7) Issue of ancestors representing such ancestors, *half-blood* taking next after common *male* ancestor and *issue*, but next after common *female* ancestor.

The principal changes by statute are in (1), (5), (7). Bracton and Coke thought it quite natural that land, being *heavy*, should never "ascend" to an ancestor, even to a father! Among collaterals half-blood could not inherit before the Act. Now a half-brother on father's side inherits after even younger sisters of whole blood and their issue, while a half-brother on the mother's side inherits next after mother herself. To illustrate the provision of L. P. A. A.: if A. buy land, and it descends to his only child B., who dies intestate and childless, A. is the *purchaser*, but if no heirs of his exist, B. being person last entitled, the land devolves on nearest relation of B.'s on his *mother's* side. A posthumous child takes by descent from his *birth* only: it may be noticed that he can also take a *devise* (*Reeve* v. *Long*), and a remainder under *settlement* by an Act of Will. III.

Estates of inheritance on descent may be subject

to *Dower, i.e.*, a widow's life estate in one-third (in gavelkind one-half) of husband's freeholds of inheritance in *possession* not held in *joint-tenancy*, on his death during a *subsisting* marriage, provided *issue* of hers would be *heritable*. At C. L. dower attached (1) to lands only in which husband was seised of a *legal* estate, but (2) to all such lands of which he was seised at *any time during coverture*. By Dower Act, 1833, it is (1) extended to *equitable* estate, but (2) confined to lands of which husband is seised at his death not otherwise disposed of. It does not attach to remainders or reversion on freehold estate, but does attach to every form of estate in community except joint-tenancy. Divorce destroys subsisting marriage. The second wife of tenant in tail special is not dowable, for her issue would not be heritable. Issue, however, need not be actually born, "*possibility* of issue" being sufficient.

Dower is barred by (1) *jointure, i.e.*, legal or equitable estate, or personalty accepted *before* marriage in substitution, or given *after* marriage raising right to *elect* between such jointure and dower; (2) any *declaration* to contrary or *disposition* of lands by husband in deed or will; (3) "*Uses* to bar dower" in case of those married before Dower Act (*a*).

Land may be subject to Curtesy (of England),

(*a*) *v.* p. 81.

i.e., widower's life estate in *whole* (in gavelkind one-half till re-marriage) of wife's freeholds of inheritance in possession, legal or *equitable*, not in joint-tenancy, on her death during subsisting marriage, provided heritable issue have been actually *born alive* (this last not necessary in gavelkind). Tenant by curtesy has powers of tenant for life under S. L. A., his estate by S. L. A., 1884, being deemed to arise by wife's settlement, even though it comes actually under her intestacy. A doweress is *not* tenant for life under S. L. A. Neither dower nor curtesy commonly occur, as settlements or wills usually make other arrangements.

There is neither dower nor curtesy by General Custom in copyholds. By special custom there may be an equivalent of dower, called "Freebench" in copyholds, and "Customary Dower" in customary freeholds. The Dower Act does not apply, but freebench usually attaches only to lands of which husband is seised *at his death*, except in a very few manors (perhaps only Cheltenham, Hemel Hempstead, and Hexham for copyholds, and one or two others for customary freeholds), where it attaches to all lands of husband *during coverture*.

Where the wife has an estate of inheritance to her *separate use*, the husband takes by curtesy, if she has not alienated it. (*Hope* v. *Hope*.)

The Canons of Descent do not now apply to

devolution of a trust or mortgage estate of *freeholds*, which on death of sole or last surviving trustee or mortgagee by C. A. vests in his personal representative "as if the same were a chattel real;" but on intestacy it probably vests in heir until appointment of administrator. (*Re Pilling's Trusts.*) Such an estate of *copyholds* or *customary freeholds* by Cop. A. vests in the *customary heir*. Heir of tenancy *pur autre vie* is sometimes said to take "descendible freehold" rather than fee.

"Estates less than freehold," *i.e.*, Leaseholds or Chattels real, if not a mere "dry" legal estate of a trustee (*i.e.*, if leaseholder had the beneficial interest), like other personalty, vest in administrator of intestate for payment of debts, and thereafter for distribution among the next-of-kin (subject to widow's right to one-third if children, or one-half if not) according to the Statutes of Distribution of Car. II. and Jac. II., viz., (1) to children and remoter issue *per stirpes*, any "advancement" in lifetime being "brought into hotchpot" or reckoned in; (2) to father; (3) to mother, brothers, and sisters equally (half-blood equally with whole blood), *children* of deceased brothers and sisters representing *per stirpes* (but not *remoter issue*); (4) remoter next-of-kin *per capita*; (5) if no next-of-kin, Crown (subject to wife's share) takes as *bona vacatia*.

The widow's portion, both as to dower and distributive share of personalty, where intestate dies without issue, is increased by Intestates' Estates Act, 1890, by which, if the whole estate does not exceed 500*l.* in value, she takes *whole;* if more than 500*l.*, she takes 500*l.*, dower or jointure (if any), and one-half of remaining personalty.

Descent of freeholds and (often) of copyholds depends originally on Norman custom of Primogeniture, Saxon custom of Gavelkind, and custom (probably older) of Borough English, these two latter customs being preserved by Inheritance Act, along with any special customs of descent in manors, when proved as a fact and not unreasonable. The inclination of legal reformers is to sweep away all these, and divide realty on intestacy (like personalty) among all equally, male and female, older or younger, perhaps giving to whole blood in both cases the preference it already has in realty over half-blood.

CHAPTER V.

COMMUNITY.

A SOLE tenant of freeholds is said to hold in *severalty*. Two or more tenants of same land at same time hold in *community*, which may be (I.) Joint-tenancy, (II.) Tenancy in common, (III.) Coparcenary, or (IV.) Tenancy by entireties. In (I.), (II.), (III.), but not (IV.), they are said to hold in "*undivided* shares."

I. Joint-tenancy is common ownership by *grant* or *devise*, without *words of severance* or actual *subsequent severance*. It has, or may have, four "Unities" of (1) Interest, (2) Title, (3) Time, and (4) Possession. (1) denotes equality of *quantity*, *i.e.*, A. and B. may have each estate for life *or* in fee, but not one for life, the other in fee. (2) shows that they take by *same* instrument; (3) that the estate of each vests at the *same* moment, but this is necessary only at C. L.; if they take by *will*, or *deed* operating under St. of Uses, the children of A. may, *e.g.*, take as they are successively born. (4) is also known as "seisin *per my et per tout*," *i.e.*, each has equal aliquot share of benefit in undivided

whole, *e.g.*, A., B., C., must be interested to extent of one-third each, neither more nor less.

But the chief incident is *Survivorship;* thus, if A., B., C., are joint-tenants, on the death of A. estate survives to B. and C. jointly, and on death of B. vests in C. in severalty. Such survivorship on death since 1897 is preserved by L. T. A. Thus *Jointure* takes its name from having been formerly provided by way of *joint* estate to a man and his intended wife, so that she might hold in severalty by survivorship. So, too, trustees are always made joint-tenants, for convenience of survival of trust estate ; in some other cases it occurs by inadvertence. Law is said to "lean towards joint-tenancy," equity against it; accordingly, without any words of severance, (1) in *partnership lands*, though legal estate survives, it is in *trust* for representatives of deceased partner; (2) *purchasers* with *unequal* shares of money take land as tenants in common, not joint-tenants; (3) *mortgagees* do the same, whether money is advanced in *equal* or *unequal* shares.

Each joint-tenant may alienate his own share *inter vivos* (not by will); *e.g.*, if A., B., C., are joint-tenants, and C. sells to D., then A. and B. continue joint-tenants as between themselves, but collectively hold in tenancy in common with D. If, however, C. sold to B., the joint-tenancy would

wholly cease, unity of possession being destroyed; A. and B. would now hold as tenants in common.

It may be severed by *partition*, which is made (1) by *agreement*, followed by *mutual releases;* (2) by order of Board of Agriculture; (3) by *Partition action* under Act of 1868, under which the Court *shall* direct *sale* instead of partition, if tenants interested to extent of one-half require, and *may*, if those interested to less extent desire, subject to contrary reasons being shown.

II. Tenancy in common is common ownership (1) by *grant* or *devise* with *words of severance*, (2) by *different* titles, or (3) by *subsequent* derivation from joint-tenancy. The only unity is of *Possession*, and even as to this they need not hold the undivided land in equal shares. In copyholds, admission of one joint-tenant admits all; tenants in common are separately admitted.

Cross-remainders, which often occur in tenancies in common in tail, are best shown by example, *e.g.*, "to A. and B. and the heirs of their respective bodies as tenants in common, and if A. shall die without issue, then as to his share to B. and the heirs of his body," and *vice versâ*. They may be implied in a will, but not in a deed.

Partition is (1) by agreement followed by mutual *grants;* (2) and (3) as under joint-tenancy.

Grant "to A. and B. and survivor and his heirs"

makes A. and B. joint-tenants for *life* with remainder in fee to whichever survives (*Quarm* v. *Quarm*). Grant "to A. and B. and the heirs of their two bodies" without words of severance, if A. and B. are persons who cannot intermarry (as brother and sister, or two males or females), creates joint-tenancy for *life* of both with survivorship, and on death of survivor tenancy in common in tail. If they are persons who can intermarry, it is tail special: A. and B. enjoy it for their joint lives; on death of (say) A., B. enjoys it as survivor; on death of B. it descends to the heir in tail, if any; if not, the estate determines.

III. Coparcenary is common ownership by *co-heirs* and arises solely by *operation of law*. It has the unities of Interest, Title, and Possession, but as to the last the seisin is *per my* only, and the tenants have not necessarily equal aliquot share. There is *no* Survivorship. Tenants in gavelkind are said to take as coparceners; otherwise at C. L. coparceners are *females* or *claim through females*, *e.g.*, if A.'s fee simple descends to his two daughters, B. and C., they take as original coparceners; if C. marry, and die, leaving a son, D., and a daughter, E., B. and her nephew, D., are now coparceners. Old baronies are often in tail general, and through coparcenary become "dormant," since no heir is generally called up while another survives. Partition is as in tenancy

in common, and could always be *compelled* at C. L. before a statute of Hen. VIII. extended the right to joint-tenants and tenants in common. Hence the name; coparceners = co-partitioners. Voluntary partition is generally by "grant to uses" (*a*) so constructed as to make each coparcener a *purchaser*.

IV. Tenancy by entireties is common ownership by man and wife under grant or devise *after* marriage, causing seisin *per tout* only, with survivorship. It arises out of legal "unity" of husband and wife. Hence, at C. L., grant or devise "to A. and B. (wife of A.) and C.," whether in words importing joint-tenancy or tenancy in common, makes A. and B. tenants by entireties of one-half, and C. joint-tenant or tenant in common with them as to the other half. Under devise *before* M. W. P. A. falling into possession *after* Act, or devise *after* Act (*Re Jupp*), the beneficial *enjoyment* of the tenancy by entireties is affected, B. having now half of the first half to her separate use: but under grant by or by direction of *husband*, there is presumption of joint-tenancy, as also by any words implying such intention (*Thornley* v. *Thornley*); in either of these latter cases A., B., and C. would take each one-third. Thus, tenancy by entireties is tending to become obsolete.

(*a*) *v.* p. 145.

CHAPTER VI.

EXPECTANCY.

Possession includes *right* as well as *fact*. A. has an "estate in possession" (1) if he is lawfully enjoying it; but equally (2) if B. is wrongfully holding it against him, A. has possession consisting in a present "Right of Entry." But if B. is lawfully holding it, and A. is legally bound to wait for determination of B.'s estate, or some other event, then A.'s estate is "in *expectancy*."

Estates in Expectancy are divided into (I.) Reversions; (II.) Remainders (1) Vested, or (2) Contingent; (III.) Executory Interests (1) by Will (Executory Devises), and (2) under St. of Uses, including (a) Springing Uses, (b) Shifting Uses. Contingent Remainders were long not recognised as "estates," and Executory Interests (or Limitations), as the name imports, are hardly yet so recognised. More strictly they are "possibilities coupled with an interest."

I. Reversion is estate remaining in grantor by *operation of law* after grant of "*particular* estate," *i.e.*, of something less than the grantor's whole

estate; *e.g.*, grant of (a) estate tail by tenant in fee simple, or of (b) term of years by tenant for life, leaves reversion in fee or for life respectively in grantor expectant on determination of particular estate or interest. The grantee is then said to hold of grantor by "*Imperfect* Tenure," as distinguished from, *e.g.*, tenant in fee simple holding of Crown or of lord of ancient manor. If the particular estate is freehold, as in (a), the reversioner is said to be "*seised* of the *reversion*"; if an interest less than freehold, as in (b), he is said to be "seised of the *land*." Hence reversions and other estates in expectancy cannot be conveyed by "feoffment," which requires actual seisin of the land. The reversion was always alienable by deed, but at C. L. "attornment," or consent of tenant to accept new lord, was necessary, until abolished by Attornment Act, 1705.

Rent may always be *expressly* reserved on grant of estate for *life* or term of *years*—in the latter case generally is. On alienation of reversion, at C. L., rent passed to alienee, but not *benefit of condition* (*e.g.*, proviso for re-entry on non-payment of rent or breach of covenants), which could only be reserved to grantor and his *heirs* (not "*assigns*"). The grantees of abbey lands, at the dissolution of monasteries, being resisted by old tenants in their attempts to re-enter, got a statute passed

(32 Hen. VIII.) giving alienee of reversion the benefit of covenants and conditions; under C. A., alienee of whole or *part* of reversion may re-enter under proviso in lease for life or years, on non-payment of rent or breach of covenants.

If fee simple is granted, there is, of course, no reversion left; but if grant is subject to condition of re-entry, there is said to be "*possibility* of reverter."

II. Remainder is estate *created* by deed or will as *expectant on determination* of particular estate created by *same* instrument. It thus arises by act of party, not by operation of Law. There is no tenure between owner of particular estate and remainderman. The instrument may leave reversion after the remainder or last of several remainders, or may carve out whole estate into remainders, *e.g.*, "to A. for life (particular estate), and after A.'s decease to B. for life, and after B.'s decease to C. for life." This leaves reversion in grantor, but the instrument may continue, "and after C.'s decease to D. and his heirs," which exhausts the whole estate. On death of A., B.'s becomes particular estate as regards C., and so on. The particular estate may be any interest between tenancy at will and fee, the former being too small, the latter leaving nothing to remain. In copyholds, admission of tenant for life admits remainderman, fine being apportioned between them.

1. Vested Remainders are limited *unconditionally* to a living and *certain* person, persons, or class, and therefore capable, *when created,* of taking effect on determination of particular estate. Hence grant or devise "to A., and after his decease to his son, B." (already born), gives B. a vested remainder, *whether or not* he outlives A.; this he can, and always could, alienate. Falling into possession of a vested remainder may be accelerated by Merger, *i.e.*, meeting of two estates, a greater and a less, both legal or both equitable, in *same right,* and without *intervening* estate, in same person. At C. L., though not in Equity, meeting *en autre droit* was sufficient, provided it was by *act of party* (*e.g.*, if trustee or executor in whom, as such, lesser estate was vested, bought the reversion), but by J. A., the rule of Equity is now made general.

2. Contingent Remainders are limited to *uncertain person* or on *uncertain event; e.g.*, "to eldest son of A." (childless), or "to B. if he shall attain 21." At C. L. they could be *devised* (if the person to take was ascertained), but not alienated *inter vivos.* Equity, however, enforced *assignment for value,* compelling assignor, if remainder afterwards vested, to execute proper conveyance. By R. P. A. they are alienable by *deed.* Their creation is subject to three Rules:—

(1) Contingent remainder of *freehold* must rest

on particular estate of *freehold*. Hence immediately follows

(2) It must vest (if at all) *during* particular estate, or *eo instanti* that it determines. Now particular estates may determine prematurely by merger, &c. Hence it was formerly customary to appoint "trustees to preserve contingent remainders" in such case, *i.e.*, in whom the particular estate should vest on determination of life estate in life of tenant for life, and remain vested in them for rest of his life. This is now needless, for by R. P. A. vesting of a contingent remainder is not prevented by *forfeiture*, *surrender*, or *merger* of particular estate. Still they were liable to fail on *death* of tenant for life before the *person* was ascertained or *event* had occurred. But by Contingent Remainders Act, 1877, this danger is *partially* removed, the Act providing that contingent remainders *created after* the Act shall be capable of taking effect as executory interests, provided they would have been valid if *originally created as such* (*v. infra*, III.).

(3) A contingent remainder cannot be limited to child of *unborn person after* life estate to *that person*. This is much older than the Rule against Perpetuities, but taken along with (2) sufficiently prevents "remoteness" in remainders; *e.g.*, grant "to A. (bachelor) for life, remainder to A.'s eldest son,

remainder to eldest son of such son born during life of A.," though it satisfies Rule against Perpetuities, is void under Rule (3). It is, however, subject to the *Cy-près* doctrine, viz., that if remainder be (1) an estate *tail*, and (2) by *devise* (not deed), the Court will construe as nearly as is possible by Law to intention of testator, and give estate *tail* (instead of life estate) *to first unborn person*. Thus his child has *chance* of taking by descent or subsequent settlement, but is not allowed to take as devisee under the will in question. Rule (3) is a particular case of old rule against "double possibilities," *i.e.*, second contingency depending on first; *e.g.*, "To A. for life, remainder to any husband she may marry, remainder to their eldest son." Here A. might marry a husband unborn at date of limitation (1st possibility), and a son might or might not be born (2nd possibility); hence the last remainder is void (*Re Frost*). This old rule does not extend to personalty.

It may be added that a remainder to *heirs* of person not *in esse*, or to *corporation* not *in esse*, is void (*Cholmley's Case*).

The same person may have *two* estates in same land, one in *possession* and one in *remainder*. Hence follows the famous Rule in *Shelley's Case*, viz., If the *same* instrument limits an estate of *freehold* to a person followed, *immediately* or *mediately*, by an

estate to his *heirs* in fee or tail, the words "the heirs" are words of *limitation*, and not of *purchase*, *i.e.*, they merely "limit" or mark out the estate taken by that person, whether in possession or remainder, and *do not convey* any estate in remainder to his heirs. *E.g.*, grant or devise of Blackacre "to A. for *life*, and after his decease to the *heirs of* A." = ordinary grant to A. and his heirs = fee simple in possession. Here the estate to heirs follows *immediately*. Again, grant or devise of Blackacre "to A. for life, and after his decease to B. for life, and after B.'s decease to the heirs of A." Here the estates to A. and to A.'s heirs cannot coalesce into one because of intervening estate to B., *i.e.*, the last estate follows *mediately* on the first and therefore A. has life estate *in possession*, and fee in *remainder* expectant on determination of B.'s life estate. If B. should predecease A., from that moment A. has fee in *possession*. On this rule four remarks may be made:—(1) both estates must be *legal*, or both *equitable*; *e.g.*, "to A. for life, and after his decease to B. in *trust* for the heirs of A." gives A. a life estate only: (2) if an instrument gives an *estate* to a person and also gives a *power* to appoint a further estate in the same freeholds, an *appointment* (*a*) made later under that power is considered to be the *same* instrument; *e.g.*, "to A.

(*a*) *v.* p. 85.

for life, subject to power in B. to appoint by deed," B. in A.'s lifetime appoints to A.'s heirs, A. thereupon gets fee in possession: (3) the intervening estate may be a *contingent* remainder; *e.g.*, "to A. for life, and after his decease to the eldest son of B. (childless) for life, and after B.'s son's decease to the heirs of A.," A. takes fee in possession, which is at first *vested* but *defeasible*, and thus on birth of a son of B. "opens" to let in the remainder to B.'s son, A. now having life estate in *possession* and fee only in *remainder:* (4) in a will *superadded words* may contradict the rule of construction; *e.g.*, devise "to A. for life, and after his decease to his *issue*," gives A. estate tail; but "to A. for life, and after his decease to his issue *and their heirs*," gives A. a *life* estate only, and makes his issue take by *purchase* (*Morgan* v. *Thomas*).

Rules (1) and (2) for contingent remainders do not apply (a) in *copyholds*, or (b) to *equitable* contingent remainders: in the former case the seisin is throughout in the lord, in the latter in the trustees, and no further particular estate is needed. Though a fee cannot be limited in remainder on a fee, two fees may be limited in remainder *alternatively* on the same particular estate; *e.g.*, "to A. for life, and after his decease to the eldest son of B. and his heirs, or, if B. have no son, to the eldest

son of C. and his heirs." This is termed "contingency with a *double aspect*."

III. Executory Interests are estates in expectancy *expressly* limited not as remainders, *i.e.*, not as dependent on a particular estate, but on an event or condition which may occur *before* or *after* determination of previous estate, and which, if occurring *before*, *abridges* or defeats such estate. Hence Executory interest of freehold can follow term of years, and fee can be limited after fee. They are created (1) at C. L. only by *will* of freeholds or other property (Executory *Devises*), or (2) under St. of Uses, in freeholds only (*Springing* and *Shifting* Uses). Future interests in freehold will be construed as *remainders* and not executory interests if *capable* of taking effect at C. L. as remainders, *i.e.*, if they can possibly be construed as *waiting* for determination of a previous estate. Thus a devise "on trust for A. for life and after his decease on trust for B., C., D., or such as survive A. and attain twenty-one," was construed, not as an Executory Interest to vest when it was seen how many out of B., C., D., attained twenty-one, but as *vested* interests in fee divestible as to those who should predecease A. or die before twenty-one (*Penny* v. *Commissioner for Railways*). The Rule against Perpetuities (*b*) was especially invented to prevent "remoteness" in

(*b*) *v.* p. 45.

executory interests; and though it does not generally apply to interests following on an *estate tail*, it is invariably employed to test validity of interests after fee, life estate, or term of years; of "equitable" remainders, *i.e*, with *legal* estate in trustees; and of remainders created under St. of Uses. *E.g.*, a grant or devise "to A. for life, and after his decease to his first son who shall attain the age of twenty-four," is in form a contingent remainder, and *as such*, according to the more probable opinion, is perfectly valid in its *creation*, since it must vest (if at all) on A.'s death, and will fail if no son of his has then attained twenty-four. If, however, it was created since 1877, and A. dies before his eldest living son has attained twenty-four, in that case by Contingent Remainders Act, 1877, it is to be construed as though originally an executory interest, and *as such* it is of course *ab initio* void for remoteness, A.'s being the life in being."

An executory devise or shifting use may on occurrence of some event *defeat* the previous estate, while a contingent remainder never can. An event on which such interests are frequently limited to arise is death of previous tenant "without issue" or "failure of issue." Formerly these phrases were often construed as meaning "indefinite failure of issue," *i.e.*, failure of issue at any future time,

however remote. The W. A. abolished the doctrine of "indefinite" failure (*c*), confining it to date of death of first devisee. And by C. A., 1882, where by any instrument since the Act an estate in *fee* or term of *years* is vested in a person, with executory limitation over on *default* or *failure of his issue*, the executory limitation shall become void on any such issue attaining twenty-one. *E.g.*, devise "to A. and his heirs, but if A. die without issue, then to B. and his heirs," (1) before 1837 might mean that A.'s estate should descend as long as issue remained, thus forming estate tail by implication with executory devise over on determination of such estate tail; (2) between 1837 and 1882 would mean that gift to B. remained in doubt till it was seen whether A. left issue him surviving; (3) if testator died since 1882, means that after any child of A.'s has once attained twenty-one, A. is absolute master of fee to keep or sell at his pleasure. Also, by S. L. A., tenant in fee with executory devise over is tenant for life for purposes of Act; hence A. can, even before issue attain twenty-one, sell the *land;* the executory devise will then, if A. die without issue, take effect on the sale *money* as being "capital money" notionally converted into land.

Executory interests may be devised, and by R. P. A. conveyed by deed. Not being strictly

(*c*) *v.* p. 135.

estates, they do not merge when held by holder of immediate estate in possession.

As to Springing and Shifting Uses, their creation and distinction, so far as different from executory devises, will be considered in the next chapter (*d*).

(*d*) *v.* p. 80.

CHAPTER VII.

STATUTE OF USES.

Uses, or *beneficial* interests *detached* from legal seisin (the *seisin* being conveyed by *feoffment,* the *use* by deed or writing *inter vivos* or will), were recognised by the Court of Chancery, but not at C. L. Their real origin is unknown, but they were employed by ecclesiastical corporations to evade the first St. of Mortmain (7 Edw. I.) till this was checked by the second St. of Mortmain (15 Rich. II.). They were also employed (1) to evade *feudal burdens,* (2) to avoid pressure of *debts* on land, (3) to render land indirectly *devisable.* The Use involved three persons: the *feoffor* conveyed by feoffment to the *feoffee to uses* to hold to the use of the *cestui que use.* If *no use* was declared, and the feoffment was for *valuable consideration,* the feoffee was seised to *his own use; if no use* was declared, and *no consideration,* there was a "resulting use" for the *feoffor.* The system played a great part during the Wars of the Roses; attainted Lancastrian or Yorkist in turn was found to have put his lands in safety by enfeoffing his lands to

some convenient feoffee guiltless of all suspicion of treason. The Court and great lords disliking object (1), and the mercantile classes as creditors object (2), at length the St. of Uses (27 Hen. VIII.) was passed to put an end to all divorce between seisin and beneficial interest. By section 1, Where any *person* was (1) *seised* of lands, &c., to *use*, confidence or *trust* of (2) any *other* person or (3) *body politic*, such person or body politic should be deemed (4) *seised* in (5) *such like estate* as was the use.

The words numbered above bring out five points in this famous St.: (1) it is confined to *freehold*, excluding copyhold, leasehold, and pure personalty; (2) it applies only where one is seised to the use of *another;* (3) the first must be an *individual*, but the second or *cestui que use* may be a *corporation;* (4) the St. "executes the use," *i.e.*, turns it into a *legal estate;* (5) this legal estate may be anything *not exceeding* the original estate of the feoffee, who (where the St. applies) becomes a mere "conduit-pipe" to carry the legal estate from feoffor to *cestui que use*. To illustrate:—(1) Grant of Blackacre "to A. and his *heirs* to use of B. for twenty-one *years*" vests the *legal* term in B., but demise of "term of twenty-one *years* in Blackacre to A. to use of B. and his *heirs*" is not affected by the St.; (2) "to A. and his heirs to use of *A.* and his heirs"

(or "*unto and to the use of* A. and his heirs") is also outside the St.; (3) "to A. and his heirs to use of —— *College*" is within the St., but "to —— College to use of A. and his heirs" is unaffected; (4) "to A. and his heirs to use of B. and his heirs" by force of St. gives both *legal fee* and *beneficial interest* to B., and nothing at all to A.; (5) "to A. and his heirs to use of B." gives B. a legal estate for life, but "to A. to use of B. and his *heirs*" gives B. a descendible estate during the life only of A., *i.e.*, an estate *pur autre vie*. Where the Statute does *not* operate, validity and effect of a deed depend simply on C. L. or on some other statute.

Many important results followed from the St. and the cases interpreting it, some quite unforeseen by its authors. Of these we may notice six.

I. It was held by the C. L. judges that the St. did not contemplate or affect a "Use upon a use" (*Tyrrel's Case*), *e.g.*, "to A. and his heirs to use of B. and his heirs to *use* of (or 'in *trust* for') C. and his heirs" vests legal estate in B., leaving C. unrecognised at C. L., but protected by Equity under the name of a *c. q. t.* This alone was enough to defeat the main policy of the St., restore *uses* under now more fashionable name of *trusts*, and establish whole modern system of "*equitable* estates." For simplicity the usual form of creating

a trust is to omit A. entirely and grant "unto and *to the use* of B. in *trust* for C.," where the *use* to B. prevents legal estate from passing to C.

II. Further, it was held that the St. applied only to "*Passive* Uses," *i.e.*, where feoffee had nothing to do but hold to the use of another, and not to "*Active* Uses," where he had positive duties to perform, *e.g.*, to collect rents, sell, &c. Hence, if trustee is to "pay *or* permit" *c. q. t.* to receive rents, &c., this in a deed gives legal estate to trustee, in a will *primâ facie* to *c. q. t.* The St. we see treated the words "use" and "trust" as synonymous; in modern times we employ the term *uses* where we wish to vest the legal estate in a person, and *trust* where some one is to take a beneficial interest *without* legal estate. Trusts may arise (1) in property *other than freehold*, (2) in freeholds where there are *Active* uses, (3) also by means of a "use *upon* a use."

III. Future estates of freehold can be created *inter vivos*—a thing unknown to the C. L. These are the executory interests already referred to as Springing and Shifting Uses. In practice they are extremely complex, but in theory simple and easily distinguishable. A Springing Use is one made to *spring* up on a future event under this St. *without defeating* any previous estate created by same instrument, *e.g.*, if A. seised in fee grants "to B.

upon A.'s own *marriage* to hold to *use* of A. for life with remainder to A.'s first and other sons in tail male," life estate and remainders "spring" up by way of use on the future event of A.'s marriage (*a*). A Shifting Use is one which on a future event *shifts* away from one person to another, *defeating* previous estate given to this first person by same instrument *e.g.*, if A. seised in fee grants Blackacre by deed "to B. upon A.'s own death to hold to *use* of C. and his heirs, but if C. do not within two years assume the *name* and *arms* of A., then to *use* of D. and his heirs," the use "shifts" away in the case provided for from C. to D. Executory Devises, whether of the Springing or the Shifting kind, may be created either directly, or (if in freeholds) under this Statute.

IV. At C. L. a man could not convey to himself even jointly with another, nor to his wife; but under this St. A. could grant "to B. to *use* of C." (wife of A.), or "to B. to *use* of D. and A.," vesting the legal estate in C., or in D. and A. jointly. But by C. A. he can now do either directly, without intervention of a use.

V. "Uses to *bar* dower" rest on this St., and were formerly employed on purchase of land by a man married before Dower Act, 1833. To prevent dower attaching, the purchase deed contained

(*a*) *v.* p. 169.

(1) general "power of appointment" over fee by purchaser, (2) in default of appointment grant to use of purchaser for *life*, (3) on determination thereof by any means during his life (*i.e.*, by surrender, merger, or forfeiture), *remainder* contingent on such determination to a *trustee and his heirs* during rest of purchaser's life on *trust* for purchaser for *life*, (4) remainder to use of *purchaser and heirs*. Thus purchaser had life estate in *possession* and fee in *remainder*, and (3), however unlikely its actual occurrence, sufficed to prevent (2) and (4) from coalescing into estate of *inheritance in possession*, to which alone dower could attach, while, if he wished to sell the fee, he could always convey by means of (1). Though now obsolete, these Uses are still necessary to be understood, because they frequently occur in purchase deeds of not remote date.

The St. of Uses does not apply to copyholds, and in the manor of Hexham, and possibly elsewhere, where freebench and "customary dower" still attach to all lands owned during coverture, there is no special custom of surrendering to such uses as the above. To bar freebench or "customary dower" in such a case, either (1) the wife must be party to any deed of sale to *release* her dower, or (2) purchase must be taken to purchaser and another jointly, the other being declared trustee for purchaser—at imminent risk of this trustee

dying and leaving purchaser entitled in severalty, and his land liable to dower.

VI. Powers mostly depend on this statute. "Power" is bare *authority to alienate*, vested in one or more, who may or may not also have *estate* in the land. Power in *executors* of *trustees* under a *will* to sell lands descended or devised is a C. L. power. Powers of tenant for life under S. L. A., of trustee in bankruptcy, and many others, are *Statutory* powers. *Equitable* powers generally merely enable some one to convey an *equitable* estate. But the most important powers not given by will are "powers of appointment" operating under this statute. They imply three persons:—*donor* of power, *donee* of power, and *appointee*. When in a settlement, they are generally "powers of revocation and new appointment," *i.e.*, to revoke existing uses and to appoint to new uses, such as before S. L. A. were vested in trustees, or sometimes in tenant for life. Any power may or may not be "clothed" or "coupled" with a trust; if it is, and the donee has not exercised it, the Court will enforce it. Powers of appointment are generally made exercisable by deed, or will, or both. If by *deed* only, and not coupled with a trust, and donee has wrongly exercised it by *will*, the Court will relieve against this "defective execution" in aid of any of five classes, viz., wife, child, creditor,

purchaser for value, or charity (*Tollet* v. *Tollet*); *secus*, when exercised by *deed* instead of by *will*. The donor can attach any formalities as requisite and sufficient to exercise of power *inter vivos*, but if exercisable by *deed* or *writing* other than will, ordinary deed with *two* witnesses is, by L. P. A. A., sufficient; by W. A., appointment by *will may* and *must* be made with regular formalities of a will, in addition to any others (if any) specified by donor as requisite to "writing," *e.g.*, seal (*West* v. *Ray*).

Other divisions of Powers are:—I. into (1) appendant (or appurtenant), (2) in gross, (3) collateral; II. into (1) general, and (2) special (or particular or limited); III. into (1) exclusive, and (2) non-exclusive.

I. (1) Powers *appendant* are coupled with *estate* of donee in land, so that exercise of power *affects* such estate: *e.g.*, power of *sale*, *leasing*, *mortgaging*, vested in tenant for life. (2) Powers *in gross* are coupled with estate of donee, but *do not affect* it: *e.g.*, power of *jointuring* vested in tenant for life, widow's interest arising after his death. (3) Powers *collateral* (or "simply collateral") are vested in stranger *without estate* in the land: *e.g.*, power of *sale by trustees* in whom no legal estate is vested.

(1) and (2) could always be *released* or (if not clothed with a trust) contracted not to be exercised; powers collateral could not, but now by C. A. can

be: and by C. A., 1882, any power vested in more than one donee may by deed be *disclaimed* by one, and afterwards exercised by the other or others.

II. (1) *General* powers enable the donee to appoint to *any* one, including himself. (2) *Special* powers enable him to appoint only to *particular* person, persons, or class. Under both, appointment must not offend Rule against Perpetuities, but under (1) the period runs from *appointment*, under (2) from *creation* of power, which in the respective cases "tie up" the property. *E.g.*, A. having *general* power of appointment by *will* may appoint to any child of his own, or of any one else if born in A.'s lifetime, to vest at any age; for the appointment by will dates from A.'s death, and the appointee is thus the life in being. But if A. by his marriage settlement has *special* power of appointment among his children, he cannot defer the vesting later than twenty-one; for here A.'s is the life in being. Special powers are also liable to "*Excessive* Appointment," *e.g.*, a power to appoint to A.'s *children* does not include *grandchildren* or *nephews*. But if the void appointment is *separable*, *i.e.*, if the donee appoint to one who is an *object* of the power and also *independently* to one who is not, the void part does not avoid the whole appointment. (*Alexander* v. *Alexander*.) The donee of a special power must appoint honestly, and to

appoint to one in particular under bargain for donee's advantage is a "Fraud on a power." But fraud must be strictly proved, and it is not fraud *per se* to appoint to donee's infant child *merely* because in case of such child's death in infancy donee must inherit. (*Henty* v. *Wrey.*)

Special power is also sometimes used as meaning power to do some particular act or *class of acts, e.g.*, power of *sale*, which (even when given to trustees for sale) does not *per se* carry powers of leasing, management, &c. And power to trustees to sell and exchange lands does not give power to sell land without timber or minerals. (*Buckley* v. *Howell.*) But by T. A., provided there is no contrary intention in the trust-deed, they may obtain general sanction of Court enabling them so to sell at any future time: also tenant for life under S. L. A. can now reserve minerals on sale of land and sell ripe timber with leave of trustees or order of Court. Formerly, if the trustees sold land without timber and allowed *c. q. t.* unimpeachable for waste to sell the timber, the sale of land was invalid, but by L. P. A. A. it may be validated on terms approved by the Court.

III. (1) *Exclusive* powers enable donee to appoint to one or more of a class while excluding other or others: (2) *non-exclusive* powers do not. Formerly, powers were *non-exclusive* unless expressed to be *exclusive*, and even appointment of *nominal* share to

one vitiated the whole, as "Illusory Appointment." But by Illusory Appointments Act, 1830, such appointments were allowed, and by Powers Act, 1874, any object of power may be excluded in appointments *subsequent* to that Act, unless the power is expressly *non-exclusive* by specifying *minimum* share which every object must get.

Powers given to two or more *jointly* do not survive on death of one donee, unless (i.) when so created, (ii.) by C. A., when given to *executors* or *trustees* with no contrary intention expressed.

Powers of attorney, *i.e.*, authority to one to do legal acts for another, are in general effectual only during life of donor, and, if not given for value, are revocable at any time, and suspended by his insanity. But by C. A., *donee* is not liable for any payment or act made without notice of death, lunacy, or revocation; and by C. A., 1882, under powers created *after* the Act, a *purchaser* also is protected in absence of notice, if (1) the power is given for *value* and expressed as *irrevocable*, or, (2) whether for value or not, is expressed as *irrevocable* for a *year* or less.

Estates arising under St. of Uses may be *legal* or *equitable*. Thus, whether at C. L. or under the St., when fee is said to be "vested in A.," this may mean that A. is (1) an ordinary owner, having *legal* and *equitable* estates, or (2) a trustee, having "dry"

legal estate only in trust for owner of *equitable* estate, or (3) a *c. q. t.*, having *equitable* estate and beneficial interest only, while legal estate is "outstanding" in another.

As to equitable estates, "Equity follows the Law," both as to quantity and quality of estate, words of limitation, devolution, &c. A trust of *lands*, by St. of Frauds, requires declaration in *writing*, unless it arises by legal construction; but once established, "Equity will not suffer a trust to fail for want of a trustee." On death of *sole* trustee, by C. A., the legal estate vests in his personal representative, but trustees of land are generally kept up to the number of three, or two at least, by appointment of new trustees. These may be appointed (1) under any *special power* to that effect in the trust deed or will: (2) under T. A., when any trustee dies, is out of U. K. for more than twelve months, desires discharge, &c., (a) by the *person nominated* (if any) for this purpose in trust instrument; if none, (b) by last *continuing* or *surviving* trustee; or, if none living, (c) by his personal representative; such appointment when made by *deed* by mere declaration vests in new trustees any trust-property other than copyholds, mortgage, or shares and stocks: (3) if trustee is *infant* or *lunatic*, or *no one* has *accepted* the trust, or it is otherwise "difficult or impracticable" to appoint, then under T. A.

the Court may appoint, and may also make a "Vesting Order," vesting the legal estate in such new trustee or trustees. A man and a corporation could not at C. L. be trustees jointly, since the first holds "to him and his heirs," the second "to them and their successors," but by Act of 1899 they may now hold jointly. Court may under Act of 1896 appoint a "Judicial Trustee" as officer of the Court under its control and supervision.

Formerly a trustee of *land* had one chance of benefit. If the last *c. q. t.* died intestate and without heirs, beneficial interest reverted to legal estate, and so belonged to trustee. But now, by Intestates' Estates Act, 1884, equitable estate is liable to escheat, and the Crown or other lord takes the land.

It should be carefully noted that the words "unto and to the *use* of" the purchaser in an ordinary purchase-deed, in no way make the deed operate under the St. of Uses, the purchaser being obviously not seised to use of *another*. The words "and to the use of" are not essential where (as in a purchase-deed) there is *consideration;* but they are always inserted by custom and *ex abundanti cautelâ* to prevent any suspicion of resulting use, or use for any third person. In a deed of *gift*, on the other hand, operating at C. L., the word "use" is *essential;* otherwise the gift would be immediately undone by the doctrine of Resulting Use.

It is very doubtful whether St. of Uses now fulfils any useful office, and whether it might not advantageously be repealed, preserving, of course, all existing instruments that operate under it.

We have now surveyed Corporeal Hereditaments both as to *quantity*, noting the *estates* and their *devolution* when of inheritance, and as to *quality*, marking the various kinds of *community* and *expectancy*, and the connection of *equitable* with *legal* estates.

CHAPTER VIII.

INCORPOREAL HEREDITAMENTS.

INCORPOREAL hereditaments are *rights* connected with corporeal things, but capable of *separate enjoyment*. The chief kinds are (1) Seigniory, (2) Advowson, (3) Tithe, (4) Profit *à prendre*, (5) Easement, (6) Franchise, (7) Rent. (2) and (4) may be *appendant, i.e.*, arising out of an ancient *manor*, originating before *Quia Emptores*, and assumed to be as old as "period of legal memory," viz., accession of Richard I. (1) Seigniory is rather "parcel of manor" than truly appendant. (4), (5), (6), and (7) may be *appurtenant, i.e.*, attached to ownership of particular land by *grant*, *prescription*, or in some cases by *custom*. All, except (5) and (6), may be *in gross, i.e.*, belonging to a person in *his own right*, not as annexed to ownership of land. The distinction between "appurtenant" and "in gross" resembles that between *prædial* and *personal* servitudes in Roman law, while the notion of "appendant" is purely feudal.

I. Seigniory becomes chiefly noticeable when it is *in gross*, and as such can be bought and sold,

carrying right to quit-rents, fines, heriots, and sometimes advowson. As parcel of a manor, it is generally in *fee*, but may be in *tail* with reversion in the Crown.

II. Advowson is perpetual right of *presentation to benefice* or "incumbency" of parish, originally, for most part, *appendant* to manor. But lord of manor could grant it away to some *private person* or to an *ecclesiastical or other corporation*. Thus many advowsons are *in gross*. If grantee was a monastery, it usually kept the chief emoluments (glebe lands and "great tithes"), sending one of the monks or some other priest to fill the living as *Vicar*, and allowing him the "small tithes." At the dissolution of monasteries, the advowson with great tithes, &c., passed by Crown grant to some layman, called in respect of tithes an "impropriator," and in respect of advowson a "lay Rector" or *patron*. Where no such separation has occurred, the living itself remains a *Rectory*. In either case, "Next Presentation," *i.e.*, right to present when next the living is vacant, is not a hereditament, and devolves as personalty, while the advowson devolves as realty. By Benefices Act, 1898, an advowson cannot be sold by auction except as appendant to manor or estate, and separation and sale of next presentation is forbidden.

III. Tithe is right (originally) of parson (Rector

or Vicar) to take one-tenth of the produce of all lands in the parish *in kind, i.e.*, every tenth sheaf, pig, &c. But it was often "commuted" to a fixed annual sum by a *modus* or arrangement between owner of tithable land and parson made binding on successors of latter. We have seen how tithe is now often payable to a "lay impropriator." By Tithe Act, 1836, payment in kind was changed to "Tithe Rentcharge," varying with price of corn "Extraordinary Tithe" on hop-gardens and orchards in Kent, &c., is commuted by Act of 1886. Tithe is payable half-yearly; is under Act of 1836 apportionable, and is recoverable by *distress* after twenty-one days' arrears, and by *execution* after forty days. Payment and recovery are now regulated by Tithe Act, 1891. Being of spiritual origin, it does not merge at C. L., but under the Act, where tithe-owner is entitled to freehold estate in the tithe-land, tithe may be merged by *deed* certified by Board of Agriculture (formerly Tithe Commissioners).

IV. Profit *à prendre* or right of common is divided into common of (1) Pasture, (2) Piscary, (3) Estovers, or (4) Turbary, which last may include not only cutting turf, but getting stone, sand, &c., on land of another. Common of *pasture* is the most frequent and important, and admits of two less usual variations: Common of *vicinage*, where lands of two *adjacent parishes* are subject to be depastured by

beasts of parishioners of both; and Common of *shack*, where *whole* arable field is subject, *after harvest*, to right of pasture vested in owners of *several* strips forming it. Common of pasture is rarely *in gross*. It is *appendant*, when by operation of law *freeholders* of manor have right to pasture *commonable* beasts on *manorial wastes*. Horses, oxen, and sheep alone are "commonable," as connected with *arable* land of freeholder, and may not be "without stint," *i.e.*, their number is strictly limited. It is *appurtenant* (1) when claimed by copyholders, (2) by freeholders of manor on other terms than above, (3) by freeholders not of a manor. Copyholders may claim by *special custom*, freeholders by *grant* or *prescription;* the special custom of copyholders is an exception to general rule against "prescribing for a profit *à prendre in solo alieno* on ground of custom." By St. of Merton the lord might "*approve*," *i.e.*, inclose portion of wastes, leaving sufficient for rights of tenants (now only by leave of Board of Agriculture); much also was lost by *encroachment* of neighbouring freeholders, or of "*squatters*," holding without interference till they gained a twenty years title by occupancy. By Inclosure Act, 1845, and other Acts, public and private, inclosure is now made under sanction of Board of Agriculture (formerly Inclosure Commissioners) after local inquiry; and by Commons Act,

1876, something has been done towards preserving open spaces near towns of 6,000 inhabitants or more.

V. Easement is distinguished from profit *à prendre*, as "privilege without profit," the owner of *dominant* tenement being merely empowered to compel owner of *servient* tenement to *permit* or *refrain from* some act on latter for benefit of former. Easement is *Affirmative* (or Positive) if, *e.g.*, owner of X. must *permit* owner of Y. to use a right of way across X. It is *Negative* if, *e.g.*, owner of Y. must *refrain* from blocking up "ancient lights" of X. *Discontinuous* and *Continuous* (terms borrowed from *Code Napoléon*) have same meanings respectively. It is *apparent* if discoverable on inspection by one ordinarily conversant with the subject, and "*of Necessity*" if absolutely requisite to reasonable enjoyment of tenement, *e.g.*, in the old books a way "to church and market" was said to be *of necessity*. "Quasi-easement" is ambiguous; it may mean (1) rights *de jure naturæ* as against another's interference with light, air, and running water; or (2) may be the use made of one tenement by another, both belonging to *same* owner. If the ownership is severed, quasi-easements which are *apparent*, *necessary*, and *continuous* pass, unless contrary intention is expressed. (*Wheeldon* v. *Burrows*.) Though easements *in gross* appear to be unknown, there may be

a *licence* unconnected with ownership of land, but *personal* and not a *hereditament*. There are also licences connected with grant of land, differing from easements and profits *à prendre* by being *not permanently annexed* to the estate granted, of which any fixed annual payment for the privilege affords presumption; such licences may probably be made irrevocable for any period within limits of perpetuity. Easements arise by grant or prescription, and are extinguished by *release*, *discontinuous* easements also by *non-user* for twenty years (or less, if intention clear); and by *unity of possession* all easements are extinguished, except *apparent*, *necessary*, and *continuous*, which are merely suspended, and revive on subsequent severance.

By C. A. "any easement, right, liberty, or privilege" with respect to freeholds (*semble*, not profit *à prendre*) may be *created* by way of *use*, and even before the Act it could be *conveyed* along with dominant tenement by way of use.

Easements must be such as are known to the Law, not capricious; *e.g.*, prospect over another's garden, but *semble* right to access of air for one's chimney or window may be gained by prescription (*Chasty* v. *Ackland*); and right to *increased lateral support* for land *weighted with buildings* is an easement acquired by twenty years' prescription. (*Angus* v. *Dalton*.)

VI. Franchise is *royal privilege* in hands of *subject* by grant or prescription; *e.g.*, fair, ferry, free fishery (*i.e.*, right of *sole* fishing in some part of public river). Franchises of treasure trove, of waifs and strays, of flotsam and jetsam, &c., are generally, when found, attached to a manor.

VII. Rent is a fixed annual tribute or return (*reditus*) yielded out of corporeal hereditaments either as part of *consideration* for estate or interest, or as *charge* thereon. The former is *Rent-service*, the latter *Rent-charge*. Rent-service is an incident of *tenure*—of tenure *proper*, when payable out of land held on freehold or copyhold estate; of tenure *improper*, when out of lesser interest, as a term for years. Freehold and copyhold rents are alike called "*quit* rents"; the former are also known as "*chief* rents": both, if payable by tenant in fee, must be older than *Quia Emptores*. Power of *distress* at C. L. was incident to all such rents in favour of grantor and his heirs; but if the rent was separated from seigniory or reversion (by separate grant of rent as *in gross*, or by reserving it on grant of the lands) the power of distress was lost, and the rent became "rent-*seck*." Now by Landlord and Tenant Act, 1730, power of distress is incident to all rents. Rent-service thus includes *chief rents* and other *quit rents*, and also the better known case of rent payable by *leaseholders* of lands or houses to their landlord.

The former is the older meaning; either may be payable in *money*, or in *kind* (out of *fructus industriales* only), or consist in *services* to be rendered. It is incident to reversion or the seigniory, and passes (by grant thereof, unless expressly reserved or otherwise severed) even without express mention; it is apportionable at C. L. on severance of reversion.

Rent-charge is *not* incident of tenure, but arises by *express charge* on land. This may be by deed *inter vivos* or by will; in the former case generally under St. of Uses, by which interest in rent-charge for years, estate for life, or (very rarely) in tail, may arise. The charge may be granted for *value*, *e.g.*, to secure repayment of a loan with interest, or as a *gift*, whether to relation or stranger. If not by will or marriage settlement, since Act of 1855 it must be *registered* in C. O. to prevail against subsequent purchasers or creditors without notice, but prevails against trustee in bankruptcy. "*Fee-farm* rent" is *perpetual* rent-charge, generally where building land (especially in Northern towns (*a*)) is conveyed to purchaser and heirs to *use*, that vendor and heirs receive the rent-charge, with further uses providing for *distress* and *re-entry*, and subject thereto to *use*

(*a*) Ground rents in London are commonly incident to reversion on a term of 99 or 60 years. It has been proposed (in lieu of "Leasehold Enfranchisement") to turn them into fee-farm rent.

of purchaser in fee simple. Rent-charge was not at C. L. apportionable, release of part of land operating as release of whole; this is amended by L. P. A. A.

Both rent-service and rent-charge are extinguished by merger, if lesser estate or interest liable to rent and greater estate come into the same ownership. At C. L. rent-service incident on reversion was also extinguished by merger of that reversion in or surrender to a higher reversion; *e.g.*, if A. seised in fee let for fifty years to B., and B. sub-let for twenty-one years to C., and then B. acquired the fee, or surrendered for renewal, the reversion on the twenty-one years being merged in fee, B. lost right to receive rent from C. By R. P. A. rent and remedies are now not extinguished, being made incident to reversion in fee originally retained by A. and now belonging to B.

Distress was *not* at C. L. incident to rent-charge, and before the Act of Geo. II. any rent-charge without *express* power of distress was "rent-seck." Now, by C. A., owner of rent-charge (if no contrary intention in title-deed) may (1) *distrain* after twenty-one days' arrear, (2) *re-enter* after forty days' arrear, or (3) with or without taking possession, after forty days' *demise* to trustee for a term on *trust*, by mortgage, sale, or sub-demise, to raise rent and arrears subject to all previous estates and interests. If

this is found impracticable, sale or mortgage of the land for the same purpose may be sanctioned by order of Ch. D. Also, by C. A., both quit rents and perpetual rent-charges (other than fee-farm rent reserved on sale or lease for building) may be *redeemed* by payment to person *absolutely entitled* of price *certified* by Board of Agriculture.

By L. P. A. A., where an estate or interest is liable to chief rent, rent on lease for years, or rent-charge, on decease of a tenant liable thereon, after existing liabilities have been satisfied, and the lease (if any) assigned to a purchaser, the personal representative is not liable for rent; but lessor or rent-charge holder may, in case of a *personal* covenant for payment of rent, follow assets into hands of beneficiaries.

CHAPTER IX.

CHATTELS REAL.

Chattel Interests in Land or Chattels Real are not Real Property, nor (strictly speaking) Estates, nor do they properly involve Tenure. But the phrase "Estates for Years" has long been in use (*a*), and "Leasehold Tenure," though incorrect, is often spoken of. Chattels Real include (1) "Tenancy by *elegit*," already noticed; (2) Tenancy by "Statute Staple" and by "Statute Merchant," long utterly obsolete; and (3) Terms for Years or Leaseholds, and some lesser interests of similar nature. Terms for years have already been often referred to, and their devolution on intestacy set out in chapter iv. Such interests in freeholds may be by demise from the freeholder, or as a sub-term demised by lessee. Similar interests in copyholds are generally by demise from the copyholder, but in some manors the copyhold itself may consist in demise by the lord for a term of years.

It will be convenient first to notice the lesser interests, viz., (1) Tenancy at Will, and (2) Tenancy

(*a*) Occurs incidentally in Co. Litt. 54 b; not once in 43 b.

at Sufferance. (1) is perhaps the origin of Terms for Years, which only by degrees became established. It may arise (a) by grant to that effect, followed by entry; (b) by mere licence and entry; (c) by operation of Law, *e.g.*, under St. of Frauds, where any lease other than for three years or less at a rack-rent is made by parol. Doubtless, originally, it was solely at the will of the *lessor*, now the will of the *lessee* is equally implied. The tenant can alienate his interest as against *himself*, not as against the *grantor*. The lessor may determine the tenancy by notice, or by any act of ownership; the lessee by notice, surrender of possession, assigning *with notice*, committing waste; and death or outlawry of either has same effect.

(2) Tenancy at Sufferance arises by *overstaying* as against a *subject* a lawful title which has expired. It is therefore wrongful, but person entitled cannot treat tenant as trespasser, before entry. He can, after notice to quit, recover double *value* by action under Landlord and Tenant Act, 1730; under Distress Act, 1737, he can, after notice of quitting given by lessee, recover double *rent* by distress or action.

Terms for years, or Leaseholds, in point of Law are all of one kind. But they may be conveniently considered as (1) Tenancy from year to year, (2) Lease for years, (3) "Long Terms." Being

personalty, whatever the length, the tenant is "possessed," not "seised."

This possession was for a time practically at *will* of lessor, who could "put Termer from his Terme" by a Common Recovery (*b*), which lessee might not "falsify"—a practice checked by 21 Hen. VIII. The very name "term" shows there must be a *definite* date of ending, as opposed to *indefinite* end of freehold estate by death or failure of heirs. The beginning may, even at C. L., be *future: e.g.*, "from next Lady Day." Tenancy is not complete till *entry*, before which tenant has only an *interesse termini*, which, however, is transferable *inter vivos* or by will. But entry is not necessary on demise under St. of Uses; *e.g.*, if A. bargain and sell fee to B. to *use* of C. for twenty-one years, the term vests immediately in C. The usual form of creation is from (such a date) for (so many years), the years being any fixed number from *one* upwards. Numbers of frequent occurrence or legal importance are 1, 3, 21, 60, 99, 200, 300, 500, 999, 1000.

I. Tenancy from year to year arises (a) by *operation of Law*, (1) on demise at *annual* rent without express term; (2) on tenant *overstaying* express term and lessor *accepting* rent (*Doe* v.

(*b*) Thus evading the 13th century writ *Quare ejecit intra terminum*, which had attempted to secure lessee's interest, as bailee, during period prescribed by the bailment.

Bell); or (b) by *act of parties*, under verbal or written demise. It is determined by *half a year's notice*, which may be a "*customary* half-year," *i.e.*, from one quarter-day to the next quarter-day but one, but always so as to end with the current year *of the tenancy: e.g.*, if the tenancy began at Michaelmas, the notice must be from Lady Day to Michaelmas; it cannot be from Christmas to Midsummer. But in agricultural or pastoral lands and market-gardens there must be, under Agricultural Holdings Act, 1883, a year's notice, unless by agreement. Hence, a lease "for one year certain and so on from year to year" cannot be determined before *two* years from its beginning.

II. Lease for years arises mostly by express demise, which, if for more than three years and not at rack-rent, must under St. of Frauds be in *writing*, and under R. P. A. by *deed*. But, if by express *agreement for lease* such as is *specifically enforcible* in Equity, or by lease *void* as not under *seal*, after entry it seems that for most purposes lessee's position is the same as under lease by deed, since J. A. (*Walsh* v. *Lonsdale*.)

Lease for years determines (1) by efflux of period, (2) sooner on fulfilment of condition (if any). *E.g.*, lease "to A. for ninety-nine years, if he shall so long live"; "to B. for twenty-one years, provided he shall not at end of seven or fourteen years

determine it by written notice"; "to C. for twenty-one years, provided that on non-payment of rent, or breach of covenant, the lessor may re-enter and determine it," &c. It may also determine by *merger*, and by *surrender in fact*, which by R. P. A. must be by *deed*, or *surrender in law*, *e.g.*, accepting a new lease on different terms before old one expires.

The position of tenant for years as to *estovers*, *waste*, and *emblements*, is the same as that of tenant for life, except that, if he holds at a rack-rent, by an Act of 1851, instead of taking emblements, he holds on till end of current year of tenancy.

On ordinary terms rent is reserved. If lease is *verbal* or merely in *writing* (as for short term), or there is merely *agreement for lease*, the claim will be for "*use* and *occupation* rent." In lease by *deed*, there is usually express *covenant* for payment of rent, in addition to other covenants (*e.g.*, as to cultivating land, repairing buildings, use of house, fire insurance, &c.). The obligation of rent under his personal covenant thus binds *lessee* throughout the term, and, if he assigns the term to a purchaser, binds *assignee* also unless and until he re-assigns to some other. Other covenants bind lessee *throughout*, and assignee for the *time being*, provided they are such as "run with the land," *i.e.*, (1) relate to things *in esse*, parcel of land demised,

or (2) where "assigns" are expressly named, relate to things not yet *in esse*, but on land demised (*Spencer's Case*); *e.g.*, (1) covenant to A. to repair *existing* houses on land, (2) by A. for himself and his assigns to keep in repair houses *hereafter to be built* thereon.

By C. A., a covenant binds *heirs* and *devisees*, without express mention, as at C. L. it already bound *executors* and *administrators*. Also, by C. A., if lessor's estate is of *inheritance*, *benefit* of covenants belongs, without express mention, to *heirs* and *assigns*; if not of inheritance, to *executors*, *administrators*, and *assigns*; also rent and *benefit* of lessee's covenants go with *reversion*, and may be enforced by beneficial owner; and *obligation* of lessor's covenants goes with reversion for benefit of owner of term for time being; and (unless contrary intention) covenant with two or more jointly may be enforced by survivor. The short effect is, that when a lease contains covenants by lessor, or lessee, or both, after all *sales of land*, or *assignments of lease* during term, both *benefit* and *obligation* of covenants continue; that, if landlord's estate is *equitable*, he (and not merely the trustee) can sue for rent or on covenants; and that *assigns* need not be named in lessee's covenants except to meet second part of rule in *Spencer's Case*. As to covenants collateral or *in gross* not touching any part of land demised,

whether or not *in esse*, *e.g.*, to build or repair a house on *other* land, they are strictly personal, and not "running with land" do not bind "assigns" even if *named* (*Spencer's Case*).

A condition or proviso of re-entry was at C. L. "indivisible," *i.e.*, if lessor once *licensed* breach of a covenant, or afterwards *waived* his right of re-entry, the proviso was extinguished; nor could grantee of *part* of reversion use such proviso. Now by L. P. A. A. and C. A. (1) licence or waiver of particular breach does not extend beyond *particular instance;* and (2) on severance of reversion, condition is *apportioned*, and may be used by assignee of each part of reversion.

At C. L. lessor could not recover rent by *distress* or *action* unless he had demanded it before sunset of *last day* for payment. By C. L. P. A. he may recover by *action*, without formal demand, if *half-year's* rent is unpaid, and no sufficient *distress* found on premises; but lessee is relieved from forfeiture on payment of arrears and costs before trial, or within *six months* after execution on judgment. At C. L. rent is payable *yearly*, but in leases it is commonly expressed to be *quarterly*, and recoverable as to *quarter's* rent without formal demand.

As to covenants in lease or agreement other than for rent, by C. A. lessor cannot enforce re-entry or forfeiture for breach till after giving *notice* in writing

and allowing reasonable time for *remedy* or *compensation;* lessee, either in lessor's action or otherwise, may apply to Court for *relief against forfeiture*, to be given on fitting terms. Lessee cannot contract himself out of this right, but it does not extend to breach of covenants against *assignment*, or *underletting;* or proviso of forfeiture on *bankruptcy* or *execution*, if lessee's interest is not sold within a year; or (in mining lease) for *inspection* by lessor of mine and books: nor is relief in any case granted as to agricultural or mining lease, public-house, dwelling let with furniture, or other like cases where personal qualification of tenant is important (C. A. 1892).

In absence of covenant, lessee may *assign* or *sub-let*. Between lessor and *assignee* there is, of course, privity, but not between lessor and *sub-lessee*. But sub-demise of *whole residue* of term is equivalent to assignment. And on bankruptcy of lessee and "disclaimer" by trustee, *sub-lessee* becomes directly liable to *lessor* (*Ex parte Walton*), but Court may protect him from forfeiture, and by Order vest the head-term in him, if desired (C. A. 1892).

A lease for years may arise by *estoppel*. If A., having no estate in the land or power of leasing, grant lease to B., both A. and B. are "estopped" from denying their own act, and if A. during the term *acquire* the land, the lease becomes fully

operative. But if A. had *some* estate in the land, *e.g.*, if, as tenant for life, he could lease under S. L. A. for twenty-one years, and he has leased for forty, the lease is valid only so far as the lessor's power of leasing extends.

III. Long terms are principally of three kinds :— (1) Terms of 100—1000 years, formerly created by way of *mortgage* as security for an advance, intended to be surrendered back on repayment. If mortgagee has taken possession, and statutory period of limitation has passed, he holds the land beneficially for residue of term. (2) Some Long Terms were created (chiefly in or about the reign of Elizabeth) as a device for making a *personal* interest in land which should be practically almost as *valuable as fee simple*. (3) Far more frequent and important are *Terms in settlements* limited to *trustees* as security for raising jointure, portions of younger children, annuities, payment of debts, &c. No rent is reserved on (1) or (3); on (2) a nominal or "peppercorn" rent, if any. Further, in (3) there are usually no covenants or impeachment of waste. The beneficial owner of land in possession (tenant for life, or in tail) holds *subject to such terms*, but they can only be used for some particular purpose, and even for that only if it is not accomplished by some other means, *e.g.*, out of savings, sale of portion of land under S. L. A., &c. The settlement may contain

a "proviso for cesser" of term, when its purpose is fulfilled, and being no longer required as security it becomes a "*satisfied* term." Formerly, instead of this ceasing, it could be "kept on foot to attend the inheritance" by assignment to a trustee for any purchaser of the estate, in order to protect him against any *secret subsequent incumbrance*, or even a claim of *dower* of which he had *notice!* But by Satisfied Terms Act, 1845, every such satisfied term *ipso facto* ceases.

By C. A., and C. A., 1882, any term or sub-term of not less than 300 years, of which not less than 200 is still to run, with (a) no rent or a peppercorn rent, and (b) without *trust* or *right of redemption* for freeholder, may by deed be "enlarged" into freehold by *legal* owner (whether also beneficial owner, or trustee) or personal representative of deceased owner. The reversion (which can be of only trifling value) is destroyed. Provision (b) excludes (3) Long terms in settlements, but (1) and (2) can generally be thus enlarged.

"Trust-term" is a common phrase applying to any term of years where the legal interest is in a trustee. A married woman's term of years will now generally be her separate property giving full power of disposal to her. In the rare cases where it is not so, the husband can *inter vivos*, but not by will, dispose of it, during coverture or after her

death, and this whether it is legal or equitable, in possession or reversionary. By L. P. A. A. a man may by deed assign Chattels real to himself and another jointly.

A term of years is the only form of personalty capable at C. L. of Executory Bequest, *i.e.*, A. may bequeath a term to B. for life, and after B.'s decease to C. The whole term then vests in B., but at his death "shifts away" to C., vesting in him and in his executor or administrator after his death.

CHAPTER X.

MORTGAGE.

MORTGAGE of lands is vesting estate or interest in lender (mortgagee), as *security* for repayment by borrower (mortgagor)—a right *in rem*, *subsidiary* to a right *in personam*. It is (1) *Legal* mortgage, if it vests legal estate or interest; or (2) *Equitable*, which may mean (i.) mortgage of "equity of redemption" after legal estate has already been parted with; or (ii.) more generally, mortgage by *deposit* of title-deeds with or without writing.

Legal Mortgage, though far more important, is anomalous, resembling the *mancipatio contracta fiducia* of early barbaric Roman Law. In early times it was by feoffment to the creditor to hold the land *without account* of profits till the debtor paid a lump sum, generally representing *principal* and *interest*. Hence its name of *mortuum vadium*, because the estate meanwhile was "dead" to the mortgagor. A "Welsh Mortgage" (now rare, if not obsolete) differed in that the mortgagee took rents and profits solely for *interest*. Legal mortgage is now conveyance of estate or interest subject to

condition or "proviso for redemption" till day named for repayment, afterwards at C. L. *absolute*, but in Equity only as *security for loan* and subject to "equity of redemption" till *foreclosure* or statutory *lapse of time*. This "equity of redemption," which is an *estate* alienable and devolving as realty, is in mortgagor, while *legal* estate is in mortgagee, but (unlike "dry" legal estate of trustee) carries rights and powers for *his own benefit*. The beneficial interest is thus divided between the two.

This peculiar state of things is the result of long conflict between Law and Equity. From time of James I. the Equity maxim has prevailed, "Once a mortgage, always a mortgage," *i.e.*, the right to redeem or "equity of redemption" remains *after*, as well as before, the day named for repayment. Meanwhile, at C. L., the mortgagee having the legal estate was treated as owner, while Equity viewed the mortgagor as still virtually owner, subject to the rights of the mortgagee as creditor. Hence, a lease by *mortgagor* alone was void in Law, a lease by mortgagee alone bad in Equity. The present rights and powers of both may thus be summarised :—

The mortgagor may—(1) continue in *possession* (subject to any special provisions in mortgage deed) unless mortgagee give notice of taking possession; (2) take rents and profits *without account;* (3) cut

timber and commit all *waste*, unless it renders the security *insufficient;* (4) sue in *his own name* for rents and profits, against trespassers, &c. (J. A.); (5) *lease* for 21 years, or 99 on building lease (C. A.); (6) *redeem*, giving six months' notice (if required) of repayment *after* the fixed day has passed; (7) sue for redemption (or under C. A. in the alternative for order of *sale*); (8) require *inspection* of title-deeds in mortgagee's hands (C. A.); (9) require mortgagee to *transfer* instead of re-conveying (C. A.).

The mortgagee may—(1) take *possession* (subject to any provisions), but on terms of *strict account;* (2) insure (C. A.); (3) appoint receiver (C. A.); and (4) sell, in both cases, on *two* months' default of *interest*, or *three* months' default after notice requiring payment of *principal*, or on *breach* of some other provision (C. A.); (5) in any *action* for redemption, foreclosure, &c., apply to Court for order of *sale* (C. A.); also, if in *possession*, (6) lease for 21—99 years (as above); and (7) cut ripe *timber*, not being ornamental (C. A.).

Thus mortgagor is *in the main* beneficial owner, unless mortgagee take possession, from which (except in extreme necessity) he is deterred by the *strict* account he has to give of his possession, being liable to mortgagor for all profits beyond reduction of principal, interest, and actual expenses; he is even liable for *occupation rent*, if he occupies, instead

of letting the land. If, on the other hand, he appoint a receiver, the receiver is deemed agent of *mortgagor*, unless otherwise provided; may claim *commission*; and after payment of *interest* and any *prior claims*, must pay the rest of the annual profits to the mortgagor or other person entitled to income. The mortgagee may not even try to enforce punctual payment of interest by inserting a proviso in mortgage-deed for *higher* rate of interest if paid in arrear, this being deemed void as a "penalty"; but the same result may be secured by providing, *e.g.*, for 4 per cent. interest *reducible* to 3½ per cent., if paid before or on a certain day!

An *attornment* clause, by which mortgagor "attorned" as tenant to mortgagee at rent equal to interest, was sometimes inserted to enable mortgagee to distrain. But as this requires registration as a Bill of Sale, it is nearly (if not quite) abandoned as means of distraining, but as constituting relation of landlord and tenant may be used to enable mortgagee to sue for possession under O. XIV. (*Kemp* v. *Lester*.)

The remedies of a legal mortgagee are (1) to appoint a *receiver*; (2) to take *possession*; (3) to *distrain*, if there be a (registered) attornment clause; (4) to *sell* under his statutory power, or any special power in the deed; (5) to *sue* on *personal covenant* generally inserted in the deed, or on *collateral bond*

(if any); (6) to sue for *foreclosure* or *sale* in the alternative.

As equity of redemption is incident to position of mortgagor, so is right of foreclosure to that of mortgagee. At any time after date in deed named for repayment (usually *six* months from execution), if any money remains unpaid and in arrears for principal or interest, mortgagee may bring foreclosure action. Judgment is for *account* to be taken before Master of amount due for principal, interest, and costs, with *six* months from date of Master's certificate for payment, or further time by leave; in default of payment, order for foreclosure is made absolute. This *ipso facto* extinguishes equity of redemption, and makes mortgagee absolute *beneficial* as well as *legal* owner. It binds all parties to action; therefore all *subsequent* mortgagees (who have a right to redeem) should be made parties to such action.

A mortgagee may pursue all his remedies *concurrently*. But if he sue on the covenant *after* foreclosure, he *re-opens* the foreclosure; hence he cannot thus sue, if he has first foreclosed and then sold the land. Nor after foreclosure Order *nisi* can he sell under power of sale without leave of Court.

An action for *redemption* may be brought by mortgagor, or by almost any one interested in the property (*e.g.*, subsequent mortgagee, reversioner, jointress, judgment creditor, &c.), and plaintiff, as

we have seen, is entitled therein to an order for *sale* in lieu of redemption, subject to terms imposed by Court.

The equity of redemption (since 1897 through personal representative) descends to heir or under a will passes to devisee. Formerly, the heir or devisee was in general entitled to have the mortgage debt discharged out of personalty; but by the three Real Estate Charges ("Locke-King") Acts, 1854, 1867, 1877, he takes *cum onere*, *i.e.*, the mortgaged land itself is primarily liable, whether freehold, copyhold, or leasehold (1877), unless deceased mortgagor expressed a contrary intention by clear reference to *mortgage*-debt, and not by mere *general* direction for payment of debts. The second and third of these Acts fix the same rule also as to another incumbrance on land, viz., vendor's lien for unpaid purchase-money, where lands were purchased by a deceased *testator* (1867), or *intestate* (1877).

The equity of redemption is alienable (1) by subsequent *mortgage*, or (2) by *sale*.

(1) Every "Second Mortgage" after a *legal* mortgage can clearly be only mortgage of the equity of redemption. Such "puisne" mortgagees rank in order of priority, for *qui prior est tempore, potior est jure*. But this is subject to doctrine of "Tacking," *i.e.*, any mortgage has priority if *tacked*

to legal mortgage, provided the later advance was made *without notice* of intermediate mortgage. This has been called the *tabula naufragii* of a puisne mortgagee by which, if security is insufficient for all, third mortgagee, *e.g.*, may "squeeze out" second. The principal cases of tacking are:— (i.) when *third* mortgagee without notice of *second* buys in *first* mortgage; (ii.) when *first* mortgagee makes further advance without notice of second; (iii.) when *first* mortgagee without notice lends again without security and then recovers *judgment*, he may tack judgment-debt to mortgage. But judgment creditor, as such, cannot buy in *mortgage* and tack it to *judgment-debt*, because he did not lend on security of land (*Brace* v. *Duchess of Marlborough*). The V. P. A. abolished tacking, but the results being found inconvenient, it was re-introduced the next year by L. T. A., 1875. By St. of Clandestine Mortgages, 1692, mortgagor loses equity of redemption, if he mortgages without giving notice of any prior mortgage, but other mortgagees, &c., may still redeem: equity of redemption, however, in such cases is usually of little value.

(2) Sale of equity of redemption may be (i.) to *stranger*, who of course takes *cum onere* with right to *redeem* but liability to *foreclosure*, while mortgagee may still sue original mortgagor on his personal covenant; or (ii.) to *mortgagee*, who by *express*

intention in purchase-deed (but not otherwise) may keep alive his mortgage to afford him priority over subsequent mortgagees (*Adams* v. *Angell*).

Mortgages may also be liable to "Consolidation," *i.e.*, right of mortgagee holding mortgages on *two* or more estates of *same* mortgagor to decline redemption of *one* without redemption of *all*. *E.g.*, A. mortgages X. to B., and Y. subsequently also to B. B. may *consolidate* X. and Y. and refuse leave to A. to pay off on one unless he also pays off on the other. By C. A. there is now no consolidation without *express provision* for it in one or other of the mortgage-deeds since 1881; but mortgagee, being in position of creditor, can generally insist on such provision. In any case consolidation cannot be made unless there has been *default* on *both* securities (*Cummins* v. *Fletcher*); nor if the *later* mortgage was created, or both for first time came into hands of same mortgagee, *after* mortgagor had *parted* by sale or mortgage with *equity of redemption* of the earlier (*Jennings* v. *Jordan*, *Minter* v. *Carr*). Subject to these rules consolidating mortgagee need not be original mortgagee, but may be transferee of one or both mortgages; *e.g.*, A. mortgages X. to B. and Y. to C., and then B. and C. transfer their mortgages to D.; D. may consolidate against A.

In Tacking, we see, there are at least *three* or more mortgages on *same* land, one only being legal

mortgage. In Consolidation there are *two* or more mortgages on *different* lands of *same* mortgagor, originally made to, or by transference coming to hands of, *same* mortgagee.

Transfer of mortgage may be (1) by mortgagee with or *without* consent of mortgagor; (2) *compulsory* at instance of mortgagor or other person entitled to redeem, in lieu of re-conveyance; when (by C. A. and C. A., 1882) the other mortgagees in *priority*, and *lastly* the mortgagor, have right of nominating the transferee. Transfer of legal mortgage comprises (1) assignment of *mortgage-debt*, and (2) conveyance of *legal estate* as security subject to proviso for redemption.

When the debt has been by any means repaid, the mortgagor is entitled to have (at his own cost) re-conveyance of legal estate now held in trust for him by mortgagee or (if mortgagee is dead) by his personal representative.

Mortgage of *copyholds* is usually completed by *surrender* to use of mortgagee with condition *avoiding* the surrender on payment of principal and interest on the fixed day, but without actual admittance. It may be combined with mortgage of freeholds by inserting in the conveyance a *covenant to surrender* with provision avoiding the surrender on repayment.

Mortgage of *leaseholds* may be (1) by *assignment*

of whole residue of term, with proviso for redemption and re-assignment; (2) by *sub-demise* of residue of term less a day or two, with proviso as before, and declaration that after *sale* or *foreclosure* mortgagor shall stand possessed of this last day or two in trust for mortgagee; (2) was till lately commoner, as it is a serious objection to (1) that it causes *privity* between lessor and mortgagee by assignment, rendering latter liable for rent and covenants; while in (2) mortgagee, being merely under-lessee, incurs no such liability; on the other hand (1) obviates risk of trustee in bankruptcy of mortgagor disclaiming and rendering mortgagee liable as sub-lessee. In either form, mortgagor covenants with mortgagee to pay rent, perform covenants, and thus prevent forfeiture; but this covenant may be implied under C. A. (*a*).

Equitable mortgages of form (i.) viz., mortgage of equity of redemption, or second and other "puisne" mortgages, have already been described. Form (ii.) by deposit of title-deeds is very common, but generally intended for merely temporary purposes. Where not accompanied by writing it was once doubtful whether it was valid under St. of Frauds, s. 4, which requires *writing* for alienation of "any interest" in land. But the statute was decided not to apply to deposit merely by way of *security*, and

(*a*) *v.* p. 152.

such securities were upheld, and can be enforced by *foreclosure*, or under order of Court (C. A.) by *sale*, or where "just or convenient" (J. A.) by appointment of *receiver*.

To the unsophisticated lay mind legal mortgage may well seem cumbrous, with its double system of *conveyance* and *re-conveyance*, both at the expense of the hapless mortgagor. Yet it must last until universal registration of title is an accomplished fact, after which legal mortgage in its present form will probably disappear into the limbo of the past along with Common Recoveries, Lease and Release, and other obsolete eccentricities.

CHAPTER XI.

LIMITATION AND PRESCRIPTION.

INVESTITIVE and transvestitive facts of ownership include (A) those by *operation of Law*, and (B) by *act of parties*. (A) chiefly (*a*) includes (1) *Devolution*, already considered, as involved in the very nature of estates of inheritance and similar interests; and (2) *Statutory Limitation* and *Prescription*. "Limitation" in respect of estates given by deed or will is "marking out" *quantum* of estate. In Statutes of Limitation, it is "marking out" the period at end of which an *unasserted* right becomes *extinct* or *dormant*. *Indirectly* this may raise a right in another, *i.e.*, in an adverse claimant in possession. Thus, if A. is in actual possession of land really belonging to B., professing to hold merely for himself and not for B., and B. for a certain period does not assert his right, B.'s right at length expires, and A.'s occupation ripens into ownership. This may be called "*Negative* Prescription," its essence lying in the *omission* of B.

(*a*) Other instances of transmission by Law are noted at pp. 20, 21, 47, 48.

to assert his right in time. "*Positive* Prescription," on the other hand, is *direct, i.e.*, from enjoyment for a certain period the Law infers a *lawful beginning of title.* Statutes of Limitation relate to *Corporeal* hereditaments, and many *Incorporeal* ones, including *Rents* of all kinds. Prescription relates to Profits *à prendre*, *Easements*, and the like.

I. Statutes of Limitation relating to estates and interests in land are chiefly four :—(1) The Crown Suits or "*Nullum Tempus*" Act, 1769, and amending Acts, relating to rights of the *Crown* in land; (2) R. P. L. A., 1833, relating to *lands* and *rents* other than rents reserved on lease for years, as amended by other Acts, of which the chief is (3) R. P. L. A., 1874; (4) Civil Procedure Act, 1833, relating (*inter alia*) to "rent upon an indenture of demise."

(1) The C. L. maxim *Nullum tempus occurrit regi* is broken in upon by the first-named Act, which bars right of Crown to recover land, rents, and profits, after sixty years' *adverse* possession by a subject, except as to franchises.

(2) (3) R. P. L. A., 1833, fixed a statutory period of twenty years, cut down by R. P. L. A., 1874 (which came into effect Jan. 1, 1879) to twelve years. The period runs from *first accrual* of right of action to person barred or other through whom he claims; but if estate at that date were in

remainder or *reversion*, and owner of *particular estate* not in possession at its determination, then twelve years after accrual of right of action to such owner of particular estate, or *six* years after right of *possession* accrued to remainderman or reversioner, whichever longest. *E.g.*, A. died in May, 1879, devising X. to B. for life, remainder to C. in fee. In May, 1880, D. took wrongful possession of X., and B. never sued in ejectment, and died in March, 1885. C. must sue in or before May, 1892 (1880 + 12), which is longer than (1885 + 6). If at accrual of right of action, claimant was under *disability* of *infancy* or *lunacy*, *six* years from his *death* or *cessation* of disability are allowed, provided the *whole* time from accrual to action does not exceed thirty years. *Coverture* is also a disability in the rare case where property is *not* to wife's separate use.

A mortgagee may sue for *possession* or for *foreclosure* within twelve years after last *payment* on account of *principal* or *interest*, or *written acknowledgment* made or given by mortgagor or by some person *liable to pay on his behalf* as between himself and mortgagor, *e.g.*, mortgagor's solicitor (*Harlock* v. *Ashberry*). If mortgagee first obtains merely *foreclosure judgment*, this is a *new title*, and, if he has not obtained *actual* possession, he may sue for this within another period of twelve years

from foreclosure judgment (*Heath* v. *Pugh*). A *mortgage debt* or a *legacy* is deemed satisfied after twelve years from last payment on account or written acknowledgment. Hence, mortgagee cannot sue on *personal covenant* in mortgage deed or collateral bond after twelve years (*Sutton* v. *Sutton*), even if mortgaged property is reversionary (*Kirkland* v. *Peatfield*). *Redemption* action must also be brought within twelve years.

We have seen (*b*) that base fee is enlarged twelve years after death of protector of settlement. *Money* and *legacies* charged on *land*, even if secured by *express trust*, are not recoverable after twelve years —an exception to the general Equity rule (adopted in J. A., s. 25) that "Time does not run in the case of an express trust." In case of *Concealed fraud*, right to sue for recovery of land or rent withheld by such fraud of person who sets up the St., or of one through whom he claims, accrues from time when it was *first discovered*, or by *reasonable diligence* might have been discovered.

Thus, the group of statutes under (2) and (3) relate to recovery of land, mortgages, quit-rents, rent-charges, and legacies charged on land. But now no title by limitation prevails against registered *absolute* title (*c*).

(4) The Civil Procedure Act, 1833, fixes period

(*b*) *v.* p. 33. (*c*) *v.* p. 145.

within which action for rent on *lease for years* may be brought at twenty years; when brought on *personal* covenant, the whole arrears may be recovered. If the action is framed *not* on covenant, but for rent as a C. L. incident of the *reversion*, or if there is no lease by *deed*, only *six* years' arrears can be recovered. On an *agricultural* holding within Act of 1883, only *one* year's arrears are recoverable by distress; and if lessee be bankrupt, only six *months*' arrears are distrainable since Bankruptcy Act, 1890.

All the Acts summarised under (1), (2), and (3), *extinguish* the right at the end of the period, and it cannot be *revived* by any *subsequent* acknowledgment. On the other hand rights on specialty contract under Civil Procedure Act at the end of the period (just as on simple contract under 21 Jac. I.) merely become *dormant, i.e.*, right of *action* is barred, but may be *revived* by written promise to pay, as well as by subsequent payment on account.

II. Prescription depends partly on C. L., partly on Prescription Act, 1832. It is right to easements or profits *à prendre actually enjoyed* for a certain time. To "prescribe" is to claim this right *in solo alieno*. This may be by alleging enjoyment of right (1) by *self and ancestors* for the period of *legal memory*, viz., since accession of Richard I., of which, however, twenty years' *undisputed* enjoyment is

primâ facie evidence; or (2) by *self and predecessors in title* to land to which right is *appendant* or *appurtenant.* This is termed "prescribing in a *que* estate," *i.e.*, on ground of estate *which* (*que*) estate has been held by claimant and his predecessors. In case (2), the requisite periods are thus fixed by Prescription Act:—(1) thirty years' uninterrupted enjoyment gives *primâ facie* right to Profits *à prendre*, which after sixty years is *indefeasible*, unless incompatible with some proved agreement; (2) twenty and forty years similarly suffice for right to *Easements;* (3) twenty years *alone* gives *indefeasible* right to *Light*, unless the right depends on written agreement. To illustrate:—if A. proves that he has enjoyed a right of way across B.'s land without interruption for twenty years, and nothing further is proved on the other side, A. succeeds; but if B. proves that thirty-five years ago the way was blocked against A. or his predecessor, and A. cannot controvert this evidence, B. succeeds; and B. equally succeeds if he can show that use of the way by A. depended on a written licence given by B. or his predecessor to A. or his predecessor for a *limited* period now *expired.* Easements may be acquired not only by tenant in fee against adjoining landowner, but by tenant against co-tenant under same landlord by 40 years' use (*Kilgour* v. *Gaddes*).

No enjoyment for periods respectively *less* than

the above *per se* affords any presumption in favour of the claimant, but such lesser enjoyment, along with *other* circumstances, may be evidence (apart from the statute) from which a jury *may* infer existence of right.

(B) Transmission of estate or interest by *act of parties* includes the cases of (1) *Wills*, and (2) *Conveyances inter vivos*. A will operates as a conveyance, vesting estates in *freehold* and *chattel interests* in executor, and through him in devisee and legatee respectively, while even on death of testator since L. T. A., 1897, it still vests devise of *copyholds* directly in devisee, but freeholds vest in devisee (1) on simple assent of executor, (2) by his conveyance, or (3) by Order of Court made after one year from death. Chattel interests vest in legatee by executor's assent only. Being, on the whole, of a simpler nature than other conveyances, wills may be first considered.

CHAPTER XII.

WILLS.

THE steps by which land held in fee became *devisable* have already been traced (*a*). Leaseholds, being personalty, may be the subject of *bequest* or legacy. A will of lands may be considered as to (1) *formalities*, and (2) *construction*.

I. Formalities. The St. of Wills (32 Hen. VIII.) required *writing*; the St. of Frauds added for will of lands *attestation* by *three* "credible" witnesses, reduced by W. A. (1 Vict. c. 26) to *two*. An interested witness was not credible under St. of Frauds, and rendered the will void; under W. A. the will is valid, but any benefit (devise, legacy, &c.) given to a *witness*, or *husband* or *wife* of witness, fails. The W. A. also requires signature at foot in presence of, and attestation by, two witnesses to a will of personalty (including *leaseholds*). A direction to pay, or charge of, debts due to a *creditor* is not affected by his being witness, and an *executor* may be witness, though he thereby loses any benefit given him in the will. Formerly a will of *personalty*

(*a*) *v.* p. 40.

could be made by a male after fourteen, or female after twelve years of age; by W. A. every will of an *infant* is void. The formalities of W. A. are required for will of soldier or sailor to pass *realty*, though not to dispose of *personalty*, for which it may be written and unattested, or verbal before witnesses. Writing purporting to be a will, though insufficiently executed as such, may suffice to execute a power (*Re Broad*).

The will of a married woman till lately depended chiefly on St. of Wills. She can devise (1) *separate* property, (2) as *executrix*, (3) as donee of a *power* exerciseable by will, and (4) by *licence* of her husband. As to (1) the *amount capable* of falling under this head is enlarged by M. W. P. A. (2) only enables her to *transmit* her position of executrix under *another* will to her own executor. (3) will be referred to again. (4) enables her to deal with property which, without being strictly to her separate use, her husband has permitted her to enjoy; but he may revoke this licence, even *after* her death, at any time before *probate*. Her will once made holds good to pass even property acquired after her husband's death, without necessity of "republication," a formality formerly required, but abolished by M. W. P. A., 1893.

A will must be *signed* at the "foot or end"; any matter *below* the signature is inoperative. Additions

can only be made by Codicil executed like the will, of which for most purposes it forms a part. Similarly, obliterations or *alterations* should be "initialed" by testator and witnesses.

A will does *not for its validity require executors;* if there be no executor, or none who accepts, an administrator *cum testamento annexo* may be appointed, who may be heir, residuary devisee or legatee, &c. Any will of realty or personalty now requires probate or "Letters of Administration."

Revocation of a will takes place (1) by *subsequent will* or codicil expressly or by necessary implication revoking; (2) by subsequent *marriage* (not, as formerly, marriage of *man* and *birth* of child); (3) by *intentional defacement* or destruction. But a will merely appointing under a power, where property would in default of appointment have gone to some other than heir, next-of-kin, or personal representative, is *not* revoked under (2): under (3) both *intentional* and *actual* defacement are essential; symbolical destruction will not avail, if the will continues in unimpaired existence. Disappearance of a will known to have been executed affords a *presumption* of its revocation, but this may be rebutted and probate granted on clear proof of (a) *contents* and (b) intention of dying *testate* as to the same (*Sugden* v. *Lord St. Leonards*).

II. Construction. Wills have always been construed more liberally than deeds, as a testator is taken to be *inops consilii*, though wills of land should generally be made under legal advice. The *first* maxim of the Courts is that the *apparent intention* of the testator is to be effectuated as far as possible. The *second* maxim is that *technical* words are in general to be construed *technically*, unless otherwise explained by the context. Thus the few simple words, "I give everything to A., and make him executor," signed and witnessed, are enough to pass fee simple of all lands and make A. absolute owner of all personalty. "I devise X. to A. and his *heirs*," would *primâ facie* give A. fee simple; but if testator "is his own lexicographer," and clearly explains that by "heirs" he means *direct descendants only*, the devise might be construed as estate *tail*. "Issue" strictly means *descendants, however remote*, but it is a very flexible word, and easily confined by the context to *children*. A testator devised X. and Y. to A. for life, after A.'s death X. to B. and his *heirs*, Y. to C. and his *heirs*, if B. or C. die without heir, his share to survivor's *heir* or *heirs*. Here "heir" in first part was construed "heir of body," in last not so: B. and C. took estates tail, and there was contingent remainder in fee to heirs general of survivor (*Re Waugh*).

The reforms made by W. A. mostly tend to more

liberal interpretation of language. They are as follows:—

1. Exceptions to Lapse. Lapse is failure of devise or legacy by death of devisee or legatee *before* testator. The lapsed gift goes to residuary devisee or legatee, if any; if none, to heir or next-of-kin, not (as formerly) to heir or next-of-kin in first instance. There is, by W. A., *no lapse* (1) of estate *tail* devised to *any devisee* predeceasing testator, but leaving issue surviving testator; nor (2) of gift of *realty* or *personalty* for more than life estate or life interest to *issue of testator* predeceasing testator, but leaving issue him surviving, devisee or legatee in case (2) being (by a generous fiction) deemed to have died immediately *after testator*. Hence, under (1), it has been held that husband of devisee in tail predeceasing testator, but leaving heritable issue him surviving, was tenant by *curtesy* (*Eager* v. *Furnivall*). And, under (2), it is evident that, if devisee or legatee has made a will, the property thus saved from lapse will pass under it, whether to one or more of his surviving issue, or otherwise.

2. Speaking from death. A will speaks from death of testator as to property, and therefore passes all property to which he is entitled *at his death*; not, as formerly, only what he had at *date* of his will and continued to keep *throughout* till his *death*.

3. General devise. This operates (a) to pass *copyholds* and *leaseholds* under word "lands" (not, as formerly, merely if testator had no *freeholds*), and *primâ facie* customary freeholds under word "freeholds," and (b) to exercise a *general* (not special) power of appointment. Hence, a married woman's will professing to devise all her "property," she having no *separate estate,* may be effectual, if she has a general power of appointment, though the will does not expressly refer to it. Since 1897, property appointed by *will* under general power vests in donee's executor, as though actually property of donee, thus passing indirectly through executor to appointee.

4. Words of limitation. It has been already noticed in chapter iii. that a devise without *any* words of limitation *primâ facie* passes fee simple, and that words expressing *intention,* without being *technical* words, suffice to give an estate tail. If freehold is devised without words of limitation to *trustees,* they similarly take fee simple; not, as formerly was sometimes held, a "determinable fee," or term of years determinable on fulfilment of the trust purposes.

5. Indefinite failure of issue. Where realty or personalty is left to one, and on "failure of issue" or "dying without issue," then over to another, this refers to failure of issue *at* or *before* the death of the

first donee, and not (as formerly) to "indefinite failure of issue," *i.e.*, failure of issue of donee at any future time after his own death. The result of the former rule was that, before 1837, such *devisee* took an *estate tail by implication*, while such *legatee* lost the gift altogether, it being deemed void for remoteness. Now the executory devise or bequest over is determined at latest at death of first donee; and we have already seen (*b*) that by C. A., 1882, it fails sooner, if issue of first donee attain twenty-one in his lifetime.

These five provisions are all subject to any "contrary intention" in the will. (4) is moreover in part subject to the Rule in *Wild's Case*, by which, if the gift be "to A. and *children* (or *issue*)," and he has children (or issue) living at *date of will*, then, in the *absence* of contrary intention, the words are words of *purchase* and not of limitation, and children (or issue) take as *joint-tenants* along with A.

As every combination and variety of estates and interests can be created by will, it is capable of becoming a long and complicated instrument. Many provisions formerly set out in full may be simplified or implied by the above rules of W. A., or by later enactments, which are mainly *Six*:—

1. Investment of trust-funds. If there is no express provision in will to contrary, these may be

(*b*) *v.* p. 75.

invested in Public *Funds*, Mortgage in U. K., and various other securities specified in T. A. *Colonial* Stocks (unless guaranteed by Imperial Government) and *Company* Shares require express authorisation in Will or Settlement. But *retention* in unauthorized investment is not *per se* breach of trust (1894).

2. Management of land and maintenance. During infancy of devisee, by C. A., trustees under will have power to manage property in ordinary course; and (the land being deemed "settled land") can exercise power of leasing vested in the infant as limited owner by S. L. A. They can also apply *income* for infant's "maintenance, education, or benefit," and accumulate the unapplied part at compound interest for person eventually entitled. This does not justify *Advancement*, *i.e.*, paying out a lump sum of *corpus* for starting infant in profession or trade, &c.

3. Power of Sale. By L. P. A. A., where a testator has *charged* lands with payment of *debts* or *legacies*, if (1) he has devised them to *trustees* for his *whole* estate or interest, the *trustees* have an *implied power of sale* or *mortgage* for raising the needful sum; or if (2) he has *not* so devised to trustees, the *executors* have a similar power. Also by L. T. A., 1897, the personal representative has power to sell and administer land, subject to Order

of Assets; and, with assent of legatee and on notice to beneficiaries of residue, may appropriate part of land to satisfy legacy or share of residue. Where the *legal* estate is expressly or impliedly (*e.g.*, by L. T. A.) devised to executors, their implied power of sale lasts *primâ facie* for twenty years, the utmost limit of a specialty debt, if not revived or extended by part-payment or acknowledgment (*Re Tangueray-Willaume and Landau.*)

4. Compounding debts, &c. Executors or trustees acting in good faith may, under C. A., (i) pay debts due *from* testator's estate on any *evidence* they think sufficient, and (ii) *compound* or settle debts or claims due *to* it. If not acting in good faith, this would be *devastavit* (*i.e.*, wasting the assets) in an executor.

5. Indemnity, &c. By L. P. A. A. a trustee is *indemnified* against acts or omissions of his co-trustees (in absence of fraud or culpable negligence of his own); and by C. A. written receipt of trustees is *sufficient discharge* to person paying money or personal effects (*e.g.*, *cheque*), and exonerates him from *seeing to the application* thereof.

6. Appointment of new trustees. The provisions of T. A. have been noticed (*c*); it is generally convenient in a will creating trusts to "nominate" the person who is to appoint under the Act.

(*c*) *v.* p. 88.

An outline Will of simple and common type may be given, suitable for a testator who has little realty and leaves a widow and children. The trust for sale brings it under S. L. A., 1882–1884. The ordinary abbreviations are employed.

This is the last Will of me A. B. of———. I revoke all former wills. I appt C. D. of ——— and E. F. of ———(hinafter called "my trees"), exors and trees of this my will. I also appt my wife B. B. and sd C. D. joint guardians of my inft children. I BEQUEATH all my furniture, carriages, &c., to my sd wife absolutely, and also the sum of £——— to be paid within——— months after my dth. I BEQUEATH the followg legies [free from legy duty] (*d*), viz., to G. H. £———, to J. K. £———, &c. I DEVISE and BEQUEATH the resue of my este and effts real and ponal UNTO AND TO THE USE OF my sd trees, their hrs exs and ads respy UPON TRUST to sell and convert the same into money, but with full power and discron to postpone such sale and convon so long as they think proper, and in the meanwhile to let any hrds unsold, and genlly to manage the same as they think fit, and after such sale and convon UPON TRUST after paymt of all debts and expenses and legies afsd to invest the resue of the sd moneys in their own name [with the consent in writing of my sd wife, and after her dth at their own discron] in any investment in which trust funds may by any law for time being be invested [or in (*special investments, if any*)] with

(*d*) Phrases or clauses in *square* brackets are inserted only if desired.

power to vary [with such consent or at such discron as afsd]. AND to stand possessed of such moneys or investments for the time being UPON the trusts followg, viz., IN TRUST to pay the income throf to my sd wife for life and after her dth IN TRUST for all or any excluding others or other of my children [or remoter issue, such issue to take vested intts within twenty-one years after dth of my sd wife] in such shares and manner as my sd wife shall by deed or will appt. AND IN DFLT of appmt IN TRUST for all my children equally, who being sn or sns shall attn twenty-one, or being dr or drs shall attn that age or marry thrunder, if only one the whole in trust for that one child. [PROVIDED ALWAYS that no child or issue who shall take any pt of sd trust premes under appmt shall share in any unappd pt throf witht bringg share or shares appd into hotchpot and accountg for same.] AND I AUTHORIZE my sd trees with written consent of my sd wife, or after her dth at their discron to raise any pt or pts not exceedg (*e.g.*, one-half, one-third, &c.) of the expectant share of any child or issue as afsd, and apply the same for his or her advancement or benefit as my trees shall think fit. AND IF no child of mine shall attn twenty-one, or being dr marry thrunder, then subjt to afsd trusts and powers, my trees shall hold sd trust premes and income throf IN TRUST for [*e.g.*, L., M., N., &c., equally, or] such pon or pons, and in such shares and manner as my sd wife shall by deed or will appt. AND IN DFLT of Appmt IN TRUST for pons or pon who wd at my dth have been entitled to my ponal este under Sts of Distribon if I had died inteste. And I declare that the staty power of apptg new trees of this my will shall be vested in my sd wife durg her life.

In WITNESS whof I have set my hand to this my will the ——— day of ——— 18 —.

Signed by sd testor in jt presence of us who in his presence and that of each other have hrunto subscribed our names as witnesses.

O. P.
Q. R.

(*Signature*)
A. B.

The language is purposely shortened, and variations would be needed according to circumstances in other cases besides those in square brackets. If the testator's estate include copyholds, they should not be *devised* to executors, but a *power* given to sell them (which is a C. L. power), thus avoiding *admittance* of executors and expense of fine.

A will devising lands in "strict settlement" is, of course, much longer; its general framework may be deduced from the second abstract of settlement given in next chapter (*e*).

(*e*) *v.* p. 167.

CHAPTER XIII.

CONVEYANCES.

CONVEYANCES *inter vivos* are of many kinds. They may be divided into those operating (I.) at C. L.; including (1) Feoffment, (2) Grant, (3) Lease, (4) Assignment, (5) Release, (6) Surrender: (II.) under St. of Uses; including (1) Bargain and Sale, (2) Lease and Release, (3) Covenant to stand seised, (4) Grant to uses: (III.) under other Statutes; including (1) Statutory Release, (2) Statutory Grant, (3) Registration.

I.—1. Feoffment. At C. L. *corporeal* hereditaments (in *possession*) were said to "lie in livery," *i.e.*, they could originally be conveyed only by "*feoffment* with livery of seisin." The feoffment was the actual *Giving* of a fief or feud (*feoffare* or *infeudare*), outwardly expressed by delivery of the *seisin* or feudal possession. The "livery" was "in *Deed*," by coming *on* the land, where feoffor put a clod, twig, door-handle, &c., into hand of feoffee before witnesses; or "in *Law*" by coming *in sight of* the land, where feoffor after uttering words of gift bade feoffee enter and take possession, which

he must do during life of feoffor. By degrees the written and sealed *evidence* of this, called "Charter of feoffment," came to be itself termed a feoffment, and by R. P. A. every feoffment (except of infant in gavelkind) must be by *deed*. Except in case of an infant so conveying, feoffment is quite obsolete.

2. Grant. This was and is appropriate to conveyance of (a) *incorporeal* hereditaments, and (b) corporeal ones *not* in possession; *e.g.*, easement, reversion, &c. A deed always was and is necessary.

3. Lease. This is a grant out of greater estate of estate for life, term of years, or tenancy at will —generally of term of years, which (with exceptions already noted) (*a*) must be by deed. The technical "operative word" commonly used in it is "demise," which implies *absolute* (*b*) covenants of *title* and *quiet enjoyment*, unless expressly qualified.

4. Assignment. This is conveyance of subsisting *term of years* from lessee to assignee, or from one assignee to another, and by R. P. A., must be by deed. A conveyance of *life estate* by tenant for life is also, but less properly, sometimes termed assignment.

5. Release. This is a conveyance of estate or interest of releasor to releasee, who already *has some estate or interest* in same land; *e.g.*, by

(*a*) *v.* p. 104. (*b*) *v.* p. 152.

remainderman to prior tenant, one joint-tenant to another, &c.: it is even at C. L. made by deed.

6. Surrender. This is conveyance of *lesser* estate to owner of estate *expectant* on its determination; *e.g.*, by tenant for term to reversioner: if *express*, by R. P. A. it must be by deed.

II.—1. Bargain and Sale. Before St. of Uses, if A. for *pecuniary* consideration contracted to convey land to B., Equity deemed A. seised *to use of* B. This use the statute of course "executed," or turned into legal estate. For a little while it became the favourite conveyance on sale of freeholds, as it (1) avoided publicity, and (2) did not require presence on or near the land, like feoffment. But St. of Enrolments in same year required bargain and sale of *freeholds* to be by deed *enrolled* within six months at Westminster, or with *custos rotulorum* of county.

2. Lease and Release. This combination, said to have been invented in reign of Mary by Lord Norris and Serjeant Moore, evaded St. of Enrolments. The so-called "Lease" was really Bargain and Sale under St. of Uses of *term* of one year, leaving *reversion in fee* to vendor, which, by a second deed (operating at C. L.) dated one day later, he "released" to purchaser. Such a Bargain and Sale of an interest *less* than freehold did not require enrolment, while the consideration

could be made merely nominal (generally 5*s.*) and not really paid, yet it gave sufficient interest in the land to enable purchaser to become releasee of fee, and paying actual price thereon to get the whole fee simple. It remained the ordinary conveyance on sale, mortgage, &c., till 1841, when by statute a release alone expressed to be *in pursuance of the statute* was made sufficient; and in 1845 both Lease and Release and Statutory Release were by R. P. A. practically superseded.

3. Covenant to stand seised. Before St. of Uses, if A. in consideration of *marriage* or *near kinship* contracted to stand seised to use of B. (wife, actual or intended, son, &c.), Equity enforced the use, which later on the St. of Uses turned into legal estate. Though this conveyance, once used for settlements, is wholly obsolete, a grant to uses technically void for some flaw may sometimes be upheld as a covenant to stand seised, if the beneficiary is a near relative.

4. Grant to uses. Obviously, by construction put on St. of Uses, this may be very widely employed for creating Powers, Springing and Shifting Uses, &c., and includes all ordinary conveyances now operating under the St.

III.—1. Statutory Release. This we saw was ordinary conveyance from 1841 to 1845.

2. Statutory Grant. By R. P. A. corporeal

hereditaments in possession were made to "lie in *grant* as well as in livery." Hence, deed of grant has become universal conveyance on sale or mortgage, and in many other cases. Where hereditaments conveyed are partly such as at C. L. lay in grant, partly not, it is clear that the grant partly operates at C. L., partly under R. P. A. It is common to speak of such as operating by C. L., as distinguished from those which derive their effect from St. of Uses.

3. Registration. By Land Transfer Act, 1875, titles *may* be officially examined and *registered* in Land Registry, as (1) *absolute, i.e.*, good against all the world except registered incumbrancers and *c. q. t.*; (2) *qualified, i.e.*, subject to other estates or interests *specified* on register; or (3) *possessory, i.e.*, subject to *all adverse or derogatory* estates or interests (if any). Any registered proprietor is free to convey in ordinary way, but may also transfer by short form prescribed by Rules, transfer being *entered* on register, and a certificate delivered to transferee and (on part-sale) to transferor also. Owing to trouble and expense of examination, and unpleasantness of publicity thus attached to blots on title, and other reasons, little use was made of this Act. Now, by L. T. A., 1897, provision has further been made for registration of (1) fee simple and (2) settled land, the latter in name of

(i.) tenant for life, (ii.) trustees, or (iii.) donee of overriding power over fee. Registration may be made *compulsory* for county or part thereof by Order in Council approved by County Council and laid before Parliament. One such Order has introduced this compulsory system into County of City of London, in which the old Middlesex registration is practically merged.

Conveyances at C. L., or under statutes other than St. of Uses, are said to be made with "transmutation of possession," *i.e.*, of *legal seisin;* those operating under St. of Uses are also thus made, except Bargain and Sale and Covenant to stand seised, in both of which, as we have seen, there is no feoffee or grantee to uses in the first instance; the bargainor or covenantor "declaring" the use on *his own* seisin, which use the St. then executes. Hence, if a *further* use is declared, *e.g.*, if A. bargains and sells to B. to use of C., or covenants to stand seised to use of B. to use of C., the use of C. is a "use upon a use" not executed by the St.; *i.e.*, B. has the *legal* estate, but as *trustee* for C., who has the beneficial interest. Hence, too, conveyance by tenant for life under S. L. A. or by trustees of settlement having legal estate is made with transmutation of possession, but one by trustees not having legal estate, being appointment to new uses, is not so made.

A deed being still necessary or desirable in all conveyances respecting land, we will consider a deed as to (1) its requisites, and (2) its parts.

I. Requisites. A deed is defined as "a writing *sealed* and *delivered*." *Sealing* is essential, though the seal is generally reduced to a red wafer; a mere circle with L. S. in it, *i.e.*, "*Locus sigilli*," has been held insufficient. *Delivery* is regularly made by touching the seal while saying, "I deliver this as my act and deed," but is effectual without words or actual handing over to other party. It takes effect from date of delivery, or if delivered to third person as *escrow*, from fulfilment of condition (*e.g.*, payment of stipulated sum). *Signature*, though prudent and therefore *universal*, is probably not generally necessary, as St. of Frauds seems not to affect deeds. *Attestation* is usual, but not necessary, except in conveyance under Mortmain Act, and in deeds of appointment under power, when intended to conform to L. P. A. A., or when power expressly required attestation. *Stamps* are necessary if the deed is to be available as legal *evidence*, but not for validity. Unstamped deeds may be tendered in Court only on payment of stamp *duty* and *penalty*. *Registration* or *Enrolment is* necessary in certain cases and for certain purposes (*e.g.*, Register Counties, Disentailing Assurances, Gifts to Charities, Bargain and Sale of Freeholds, certain

Rent-charges, &c.). Requisites then are—Sealing, Delivery (probably not Signature), for all purposes; sometimes or for some purposes, Attestation, Stamps, Registration, Enrolment.

II. Parts. No special form is essential, but any marked departure from the scientific arrangement of parts would in the long run be unintelligible or suspicious. The order of *parts* is (1) Date; (2) Parties; (3) Recitals; (4) Testatum; (5) Operative Words; (6) Parcels; (7) Habendum; (8) Uses or Trusts (if any); (9) Provisoes or Conditions (if any); (10) Covenants (if any), including (in certain cases) *Acknowledgment* and *Undertaking*.

(1) Absence or error of *date* does not avoid a deed, if true date can be proved.

(2) *Parties* in Indenture must be at least *two* (described as "of the *one* part," and "of the *other* part") and may be more ("of the first part," second, third, &c.). Thus, parties to transfer of mortgage may be A. (*mortgagee*) of first, B. (*mortgagor*) of second, C. (*transferee*) of third part. Names of each party are followed by *address* and "*addition*," *e.g.*, Colonel in the ——, Esquire, &c.

(3) *Recitals* are in this form:—"Whas the sd A. is seised in fee of, &c." Such recitals are merely "Introductory." "Narrative" Recitals describe particular instruments or events. They are not essential to validity of deed, but are often most

desirable, because (1) they give a succinct *history* of the property since the last purchase for value making deed suitable in future, as "Root of title"; (2) by V. P. A., 1874, after twenty years they become *presumptive evidence of facts* stated; (3) they may *explain* or *control* ambiguous operative words; (4) within certain limits they *estop* parties to deed and those claiming under them. As to (3), they govern only where operative words are ambiguous, being governed by latter if these are clearer or are inconsistent with recitals.

(4) *Testatum* may be said to include all that follows introduced by the words "Now this Indenture Witnesseth" (always written with capitals) or (if no recitals) "Witnesseth" only. If two or more collateral acts are effected by same deed, there is more than one Testatum.

(5) *Operative Words* show nature and effect of deed; *e.g.*, *grant* or *convey* in sale or mortgage-deed of freeholds, *assign* in transfer of lease, *demise* in lease itself, &c.

(6) *Parcels* or description of items of property conveyed frequently begin "All that," *e.g.*, "land in Parish of ——, known as ——," &c., or "land described in schedule hereunto and coloured pink in map annexed." Difficulties of *fact* rather than of Law often arise in exact description of parcels. "General words," including *appurtenances* and

reputed appurtenances, and "Estate Clause," expressing transfer of every interest or right of conveying party (formerly employed), are usually now sufficiently implied by C. A. 1—6 are termed "Premises" as distinguished from habendum.

(7) *Habendum* shows the *estate* or interest of grantee and whether or not he holds to his own use: *e.g.*, "To Hold *unto and to the use of* said B. in *fee simple*" (or "of said B. and his *heirs*"); or in assignment of lease, "To Hold *unto* said B., his *executors*, administrators, and assigns."

(8) The word *Use* we saw (*c*) is now employed where *cestui que use* is intended to take *legal* estate under the statute, *e.g.*, in Springing or Shifting Uses; *Trust* where he is not, but is to be a *c. q. t.*, or where Active trusts are imposed on a trustee.

(9) *Provisoes* are exemplified by proviso for *redemption* and *reconveyance* in mortgage, extending or limiting mortgagee's statutory power of sale, special powers given to trustees, or to tenant for life, &c.

(10) *Covenants* have already been often referred to and illustrated. Certain ordinary "covenants of title" may under C. A. be implied. I. In conveyance on *sale*, the words "as beneficial owner" inserted in operative words (*e.g.*, "the said A. B. as *beneficial* owner conveys," &c.) imply (1) Right

(*c*) *v.* p. 80.

to convey; (2) Quiet enjoyment; (3) Freedom from incumbrances; (4) Further assurance. These covenants are "qualified," *i.e.*, they merely warrant that since last purchase *for value* nothing has been done by vendor, his ancestors, or testators to worsen (?) the title he or they received. II. On assignment of *leaseholds*, by use of same words same four covenants are implied; and (5) that lease is *valid* and subsisting, *rent* paid, and *covenants* performed (similarly qualified). III. In *mortgage*-deed, by same words same four covenants are implied, but here for greater security of mortgagee they are "absolute," *i.e.*, they amount to warranty against any act of *any person* having rendered title imperfect. And similar *absolute* covenant is further implied in mortgage of *leaseholds* that lease is valid, &c., and that mortgagor will pay rent and perform covenants. IV. In a *settlement*, a person expressed to convey "as *settlor*" merely implies a covenant for *himself* and his *successors* in title for "Further Assurance," *i.e.*, that he or they will, if present conveyance be insufficient, execute any further conveyance or do anything reasonably required. V. In any conveyance, *trustee*, *mortgagee*, *personal representative*, or *committee* of lunatic, expressed to convey as such, merely implies a covenant against having "incumbered" the title, *i.e.*, by creating any fresh charge on the land. On sale of registered

land on open contract, no covenants can be required in case of *absolute* title; and where it is possessory or qualified, only as to other estates in same land.

Acknowledgment and *Undertaking* occur only when vendor cannot deliver title-deeds to purchaser, *e.g.*, if they refer to a *whole* property of which he is selling *part;* the deed then contains *acknowledgment* of purchaser's right to inspect and copy, and *undertaking* for safe custody of them. By C. A., the liability of both is thrown on every *possessor for time being*, and the benefit on the person to whom they are given, and any one (other than lessee at rent) claiming estate or interest through him. *Semble, trustees* selling cannot be compelled to give such *undertaking*, though they may reasonably give *acknowledgment.*

Conveyance of *Copyholds*, as we have seen, is by *Surrender* and *Admittance.* But this is often (especially on sale of property comprising both freeholds and copyholds) preceded by "covenant to surrender" contained in a deed, which (when so *preceding*) is a "conveyance" within C. A., so that the usual covenants of title may be implied in the prescribed manner.

The usual steps taken on sale are:—(1) *Contract of* sale signed to satisfy St. of Frauds, s. 4. If sale is by *auction*, "conditions of sale" will have preceded. (2) Vendor's solicitor forwards "*Abstract*

of Title" to purchaser's solicitor. (3) "*Requisitions*" by purchaser, and *Answers* by vendor. *Searches* for incumbrances, &c. (4) Purchaser's solicitor sends *Draft Conveyance* to vendor's solicitor. (5) *Engrossment* on parchment, and *Execution.*

1. Among usual conditions may be noticed: (1) Sum to be *deposited* by purchaser, and *date* for "completion of contract" by execution of conveyance. (2) "Root of *title*," *i.e.*, conveyance from which proposed title is to start and be traced onwards. In absence of express provision (*i.e.*, on "open contract"), purchaser has by V. P. A. right to forty years' "marketable" (not merely "good holding") title on sale of land, but on sale of *tithes* the *Crown grant* must be shown in addition, and on sale of *advowson* the period is 100 years. On *open* contract (i.) to assign *lease* or *sub-lease*, by V. P. A. and C. A., lessee or sub-lessee cannot be made to produce title of *freeholder* or *superior lessee;* (ii.) to sell *enfranchised copyholds*, purchaser cannot require evidence of title of lord of manor to *enfranchise;* and (iii.) *generally*, no purchaser can call for abstract of *instruments*, or evidence of truth of *recitals* therein, of earlier date than the "root of title." The root of title should (if possible) be some conveyance for *value;* if not, it should be exactly described, or the condition is *misleading*

(*Marsh* v. *Earl Granville*). "Misleading conditions" are a ground for rescinding contract; so also were "depreciatory conditions" on sale by *trustees*, but now by T. A. these do not affect *bonâ fide* purchasers. (3) Time limited for *requisitions;* often with proviso that, if vendor is unable or unwilling to comply with them, he may rescind contract, returning deposit. (4) Sale not to be annulled by *error* or *omission* as to parcels, but *compensation* to be made.

2. "Abstract of Title" is abbreviated summary of *instruments* dealing with property from date of root of title, showing *rights* and *liabilities* attaching to the land; it is made at *vendor's* expense. On sale of registered land, purchaser on open contract is entitled only to (i.) land certificate, (ii.) statutory declarations (if requisite), and (iii.) evidence whether any incumbrances are still subsisting or discharged.

3. "Requisitions" are questions on points in abstract suggesting *defects* in title or *liabilities* suggested by abstract, or other points discovered by Searches. Chief points to be *searched* for are:—(1) disentailing assurances; (2) conveyances of married women; (3) Crown and judgment debts; (4) rent-charges (not by marriage settlement or will) since Act of 1855; (5) adjudications in bankruptcy; (6) *lites pendentes;* (7) registration in

"Register Counties." Questions often arise whether every payment of Death Duties has been duly made, Succession and Estate Duty forming a charge on land, as against purchaser or mortgagee, barred after *six* years from notice or part payment to Commissioners of Inland Revenue, or *twelve* years from succession itself: they may also be remitted after *twenty* years from death, in favour of beneficiaries, &c. But purchaser of *absolute* title is protected against all such charges not actually on the register. Questions as to requisitions, title, &c. not affecting validity of contract itself) may be settled on "Vendor and Purchaser Summons," under V. P. A., s. 9. The whole course of proceedings to insure that purchaser does not "buy a law-suit instead of an estate," or an estate clogged with unforeseen liabilities, is apt to be expensive, the costs falling partly on both sides: in particular (by C. A.) costs of inspection of documents *not in vendor's possession* and of *searches, stamped* or *office copies*, &c., fall on *purchaser*. On open contract (1) to *lease*, or (2) to *mortgage*, *lessee* or *mortgagor* pays costs of *both* solicitors, if each party employs different solicitor. Conditions of sale sometimes, requisitions and answers thereto, and conveyance itself much oftener, are settled or drafted by counsel. It is not yet possible to forecast the exact effects of compulsory registration of title under L. T. A.: for

a longer or shorter time to come the present system must still hold good over the greater part of England.

Conveyancing is an *Art*, and cannot be taught by books only. But some general remarks and analysis of specimens may be of assistance both towards understanding and framing actual deeds.

To begin with purchase-deeds. If the title is clear and free from complication, and the deed is not intended as a future root of title or to "make evidence," recitals may be omitted, and it might run thus :—

This Indre made the ——— day of ———, 18—, Btwn A. B. of ——— in the Cy of ———, Esq., of the one part, and C. D. of ——— in the Cy of ———, Gentn, of the other part, WITNESSETH that in conson of £——— by sd C. D. to sd A. B. pd (the recet whof the sd A. B. hby acknowledges), the sd A. B. as beneficial owner grants to the sd C. D. ALL THAT (land or houses described, or described in schedule and delineated in map) : TO HOLD TO AND TO THE USE of the sd C. D. in fee simple : IN WITNESS whof the sd pties have hrunto set their hands and seals respy on the sd day in the sd year above written.

[Schedule, with map.]

Signed, sealed, and delivered by the above-named A. B. and C. D. in the presence of E. F. of ———. A. B. (L.S.) C. D. (L.S.)

Very few cases would admit of such brevity. But the main framework in any deed, long or short, is found in the same heads and same order: viz., Parties, Recitals, Testatum and Operative Words, Parcels, Habendum, Uses and Covenants (if any). Thus, the above form might be enlarged by, *e.g.*, two "introductory" Recitals. (1) that "A. B. is seised in fee," &c.; (2) that "sd A. B. has agreed to sell the sd premes to C. D. for £——," and by any express Covenants differing from or additional to those implied by C. A.

On purchase of *Leaseholds*, the parties will be (1) Assignor, and (2) Assignee; the main Recitals (1) Grant of Lease, [(2) Previous assignments (if any)], (3) Agreement to assign; in Operative Words, A. "as beneficial owner" will *assign* to sd B., his exs, ads, and assigns (parcels) "*To* Hold the same Unto sd B., exs, &c., for resue unexpd of sd term"; and there will be express Covenant by B. to indemnify A. for any future non-payment of rent or breach of covenants during residue of term.

On purchase of *Copyholds*, the deed preceding Surrender will contain Recital of title of copyholder; in this, though true seisin is in lord, it is usual to say that vendor is "seised of a descendible estate to him and his heirs to be holden at the will of the lord, &c.": in Operative Words, A. "as beneficial owner doth covenant with sd B., his hrs and assigns,

that sd A. at cost of B. will surrender to lord of manor of ——, according to custom of sd manor (parcels) to Use of sd B. his hrs and assigns to be Holden of lord of sd manor by copy of Crt Roll accordg to custom of sd manor": and there will be a Declaration of Trust for B. till such surrender.

The variations in these two cases show (1) the *personal* character of Leasehold, B.'s name being followed by "executors," &c.; and (2) the peculiarities of Copyhold tenure as parcel of a *manor*.

If vendor under specifically enforcible contract of sale die before completion, his personal representative has power under L. T. A. to convey to the purchaser. On sale by tenant for life under powers of S. L. A., conveyance will show (1) that purchaser pays to trustees or into Court by direction of vendor, (2) habendum discharged from settlement, and (3) may state that covenants implied under C. A. are specially limited to acts or default of vendor and his privies.

Mortgage-deeds closely resemble purchase-deeds, the essential difference being addition of Proviso for Redemption. A skeleton mortgage follows, comprising freeholds, copyholds, and leaseholds, mortgagees being three trustees under a settlement authorising investment of trust-funds on leasehold security. The trust does not appear on face of deed, so as not to affect other persons with notice of

trust. By C. A. expression of *joint account* suffices to make money remain on joint account and receipt of survivors or survivor to be *complete discharge* to payer.

Date and *Parties* (A. *mgor* of one pt, B., C., D., *mgees* of other). *Recitals* (1. Title to Freeholds ; 2. Admission to Copyholds ; 3. Lease ; [4. Assignments, if A. is not original lessee]; 5. Agreement to lend £——— out of moneys on jt account on sd security. 1st *Testatum* (conson and recet). *Operative Words* (sd A. as beneficial owner doth grant to sd B., C., and D. in fee simple). *Freehold Parcels*. *Habendum* (To HOLD in fee simple subject to proviso for redemption hinafter conted). 2nd *Testatum* (afsd conson). *Operative Words* (sd A. as benef. owner hby covenants to surrer to lord of manor of ——— accg to custom throf). *Copyhold Parcels*. To USE of sd B., C., and D. to be holden of lord of sd manor by copy, &c., subject to services, &c. SUBJECT TO CONDON for makg void the same corresponding to proviso for redemption hinafter conted. *Declaration* of trust for B., C., and D. till surrer. 3rd *Testatum* (afsd conson). *Operative Words* (sd A. as benef. owner demises to sd B., C., and D. thr exs, &c.). *Leasehold Parcels*. To HOLD to them thr exors, &c., for resue of sd term of ——— yrs except last day throf subject to proviso for redemption hinafter conted. *Declaration* of trust of last day by mgor for mgees. *Proviso* for redemption (PROVIDED ALWAYS that if sd A. his hrs, exs, &c. shall on sd day of ——— next pay to sd B., C., and D. thr exs, &c. sd sum of £——— with intt as afsd, sd B., C., and D., thr exs, &c. shall on request and at cost

of sd A., his hrs, exs, &c. reconvey and surrer or assign sd freeholds and leaseholds respy to use of sd A. his hrs and assigns or as he or they shall direct). *Covenant* to pay intt (AND sd A. doth hby for himself, his hrs, exs, &c. covenant with sd B., C., D., thr exs, &c., that he the sd A., his hrs, &c., or assigns will on ——— day of ——— next, pay to sd B., C., and D., thr exs, the sum of £——— (principal) with intt for same at rate afsd, if not so pd will pay intt thron at rate afsd on ——— day of ———, and ——— day of ——— in every year until principal repd : PROVIDED ALWAYS that if half-yr's intt at rate of (*e.g.*, $3\frac{1}{2}$ per cent. (be pd on apped day or within ——— thrafter, the sd B., C., and D., &c., shall accept the same satisfon for the intt at rate of (*e.g.*, 4 per cent.) payable under covenant hinbefore immediately conted) [Express powers of sale, &c., if differing from implied powers under C. A. Agreement for consolidation]. IN WITNESS, &c.

The mortgage of Leaseholds here is by sub-demise. The covenants of title, implied under C. A., are *absolute*. A deed of Transfer of Mortgage may be sketched as follows ; the mortgagor being a party to testify to the state of accounts between him and mortgagee.

Date and *Parties* (A. *mgee* of 1st pt, B. *mgor* of 2nd, C. *transferee* of 3rd). *Recitals* (1. Mge. 2. Debt still owing, but intt pd. 3. Agreement for transfer). 1st *Testatum* (conson pd by C., recet by A.). *Operative Words* (sd A. as mgee, at request of sd B., doth hby Assign unto C., his exors, &c. ALL THAT, the sd

principal sum of £———, owing to sd B. on security afsd, And all intt to become due thron, AND benefit of all powers, remedies and securities for securing or recovering sd principal sum and intt: To HOLD the same UNTO sd C., his exs, &c., absolutely). 2nd *Testatum* (afsd conson). *Operative Words* (sd A. as mgee, at request of sd B., doth Grant and sd B. Grants and Confirms unto said C. ALL AND SINGULAR the hrds and premes granted by the hinbefore recited indre of mge): To HOLD the same UNTO AND TO THE USE of the sd C. in fee simple, SUBJECT to the said eqy of redemption, on payment, &c. IN WITNESS, &c.

If mortgagor has "incumbered," *i.e.*, mortgaged equity of redemption, there is (1) fresh personal covenant for repayment, and (2) reference in habendum to original proviso for redemption. For copyholds, where there has been surrender under mortgage, there will be new surrender to use of transferee.

In illustrating Reconveyance, we will suppose the mortgage to have been transferred, and the transferee to have died intestate; also that the mortgagor has sold the equity of redemption (in popular language, sold the *land* subject to the mortgage) and the purchaser has died after devising it. The Reconveyance will then assume this form:—

Date and *Parties* (A. *admor* of transferee of the one pt, B. *devisee* of the other). *Recitals* (1. Mge. 2. Transfer.

3. Dth of transferee and grant of Letters of Admon to A. 4. Sale of eqy of redemption. 5. Purchaser's Will. 6. Dth of purchaser and vesting of eqy of redemption in B. 7. Agreement for repaymt and reconveyance). *Testatum* (paymt of principal and intt, and recet). *Operative Words* (sd A., as ponal reprive of ———, doth Grant and Release unto sd B., his hrs and assigns, ALL AND SINGULAR the hrds, &c.) : TO HOLD the same UNTO AND TO THE USE of the sd B., his hrs and assigns discharged from the sd sum of £———, and intt thron, and from all clms and demands under the sd mge or otherwise. IN WITNESS, &c.

In the above Transfer, the words "said A. as *mortgagee*," and in the Reconveyance the words "said A. as *personal representative*," &c., under C. A. imply covenant against incumbrances. Where there has been surrender of copyholds, A. will warrant to enter up on Court roll satisfaction of mortgage debt.

Leases vary greatly. Farming leases usually provide in detail for a course of cultivation according to custom of the country, or the practice on the particular estate. An outline lease of house and land attached to it may be given :—

Date and *Parties* (A. *lessor* of the one pt, B. *lessee* of the other). *Testatum* (conson of rents and covts). *Operative Words* (sd A. Demises to sd B., his exs, ads, and assigns, ALL THAT messuage and tenmt known as No. —— in ——— Street, &c., togr with the yard, garden, and outbuildings thto belongg, and the field or

close on the N. side throf, known as ———, contng in length ———, and in brdth ———, or thrabouts, TOGR with right in common with lessor and adjoing tenants or occupiers to the use of the roadway on the E. side known as ——— Lane, leading from ——— to ———; lessee contributg from time to time a due proportion of expenses of maintaing sd roadway): To HOLD to sd B., his exs, &c., from ——— next for 21 years, PAYG therefor yrly durg sd term the rent of £———, by four quarterly paymts on the four usual quarter days in every yr, the 1st paymt to be made on the ——— day of ——— next. AND the Lessee doth hby, for himself and his assigns, covt with the Lessor in mner followg, that is to say:—Covt for paymt of rent [and taxes] [painting and repair] [agst assigng, or underlettg witht written leave]. Proviso for re-entry by B. on non-paymt of rent or breach of covts: AND the Lessor doth hby, for himself and his assigns, covt with the Lessee—Covt for quiet enjoymt [Insurance] [Power to (lessor, or) lessee to determine lease at end of first seven or fourteen yrs]. IN WITNESS, &c.

The proviso for re-entry will, as regards non-payment of rent, be expressed to take effect, "whether any formal or legal demand thereof shall have been made or not," but of course is subject to the rules as to relief under C. L. P. A. and C. A. The whole of the lessee's covenants here named "run with the land." There is no need for recitals, It may be noticed that on open *contract* to grant lease (V. P. A.) or sub-lease (C. A.), intending

lessee or sub-lessee cannot call for freeholder's or leaseholder's title.

For Under-lease, there will be recital of head-lease, and covenants by sub-lessee, corresponding to lessee's covenants in head-lease, and lessee will covenant to pay head-rent, and do nothing to cause forfeiture.

Settlements of land may be *Personal* or *Real.* The former are made by way of Trust for Sale, producing "notional" conversion of the land into money, exactly as in the form of will given in chapter xii. To take a comparatively simple case: Suppose a man about to marry has a little land which he wishes to settle, reserving his personalty, while the lady has personalty only, also to be brought into settlement, the general outline will be as follows:—

Date and *Parties* (A. *intending husband* of the 1st pt, B. *intending wife* of the 2nd, C., D., E., hinafter called "the *trees*" of the 3rd). *Recitals* (1. Intended marriage. 2. Title of A. to freeholds. 3. Transfer [or intended transfer] of B.'s ponalty to sd trees. 4. Agreemt to settle). 1st *Testatum* (in pursuance of sd agreemt and conson of sd mrrge). *Operative Words* (sd A. as settlor with approbation of sd B., Doth hby Grant unto sd trees and their heirs ALL THAT, &c., TO HOLD the sd hrds and premes TO THE USE of sd A. and hrs till sd mrrge, and after the sd mrrge TO THE USE of the sd trees thr hrs and assigns, Upon the Trusts hinafter

declared. 2nd *Testatum* (same agreemt and conson). AND it is hby Agreed and Declared that sd trees shall after sd mrrge stand possessed of sd (ponalty of B. transferred to them), UPON TRUST that they shall at request in writg of sd A. & B., or the survor, and after dth of survor, at discretion of sd trees, sell sd hrds and premes hby assured, with all powers in that behalf of absolute owner. *Powers* of Leasing and Interim Managmt till sale. *Declaration* of Trust out of sale-moneys and till sale to pay A. income derived from, or rent and profits of freeholds, and to B. income derived from her ponalty, after dth of A. or B. to pay both to survor, after dth of survor In Trust for children attaing 21, or drs marrying thrunder, as apped by A. or B. jointly by deed, or by survor by deed or will, in dflt of appmt equally. [*Hotchpot* and *Advancemt* clauses.] In dflt of issue, *Ultimate Trust* as to sale-moneys of freeholds In Trust for next-of-kin of A. under Sts of Distribution, but subjt to any appmt by A. by deed or will; as to ponalty similarly in favour of B., her appointees, or next-of-kin. [Agreemt for settlemt of after-acquired ppy of B. amounting to more than £——— at any one time]. *Nomination* of pon (*e.g.*, A. and B., or survor) to appt new trees under C. A. *Proviso* avoidg settlement if no marriage within 12 months. IN WITNESS, &c.

It will be seen that legal estate in the freeholds continues by way of resulting use in A. till the marriage, when it passes to the trustees; the subsequent trusts, being *active* uses, are not executed by the Statute. The latter part of the

Settlement (except as to freeholds) is similar to the will outlined in chapter xii.

"Real" Settlements are mostly by way of "strict settlement," creating life estates in persons *in esse*, followed by estates tail in remainder given to unborn persons, in a regular order of succession, together with provisions for pin-money, jointure, and portions. The estates may be either *legal* or *equitable*. In the former case, the trustees take no estate, but have powers of control, management, and alienation. An example of the former settling freeholds and leaseholds may be thus sketched :—

Date and *Parties* (A. *husband* of 1st pt, B. *intending wife* of 2nd, C. and D. *trees* of 3rd). *Recitals* (1. Intended mrrge. 2. Title to Freeholds. 3. Title to Leaseholds. 4. Agreement for settlement). 1st *Testatum* (in pursuance of agreemt and conson of mrrge), sd A. as settlor, with approbation of sd B., Doth hby Grant unto sd C. and D. in fee simple, ALL THAT (more partarly described in Schedule hto), TO HOLD the same Unto sd C. and D., and thr hrs, TO THE USE of sd A. in fee simple until sd mrrge, and thrafter TO THE USES followg (that is to say) : TO THE USE that the sd B. and her assigns shall durg jt lives of sd A. and B. receive yrly rent charge of £———, and after dth of sd A., shd sd B. survive him, yrly rent-charge of £——— as jointure, and in lieu of all dower, the same issuing out of hrds hby settled and payable (quarterly, or half-yrly, &c.) : AND subjt and charged as afsd TO THE USE of sd A. and his assigns durg his life [witht impeachmt of waste],

And from and after his dth To THE USE of sd C. and D., thr exs, &c., for the term of 1000 yrs, to commence from dth of sd A. witht impeachmt of waste, Upon Trusts and subject to Powers and provons hinafter decld concerng the same. And from and after determon of sd term, and meanwhile subjt thrto and to trusts throf, To THE USE of 1st and every other son of sd A. successively in remer, accg to seniority in tail male, with remer in dfit of such issue, To THE USE of sd A. in fee simple. AND IT IS HBY AGRD AND DECLD that sd premes are hby limed to sd C. and D., thr exs, &c., for sd term of 1000 yrs, Upon Trust that if there shall be younger child or children who shall attain 21, or being dr or drs marry thrunder, other than any son who before 21 shall become entitled in posson or remer under these presents to sd hrds hby settled for 1st este in tail male, then sd C. and D., &c., shall after dth of sd A. raise by mge or sale of sd premes or of pt or sd term, or out of rents and profits throf, or by sale of timber or minerals, or by any of means afsd, the sum of £———, and hold the same in trust for all or such one exclusively on such condons and manner as sd A. [or sd A. and B. jointly, or survor] shall by deed or will appt. AND IN DEFAULT of, and subjt to such appmt, in Trust for such children or child, and if more than one, equally as tenants in common [*Hotchpot* and *Advancement* Clauses. *Power* to *jointure* any future wife and *portion* her children. *Extension* of powers under S. L. A., and of powers of *management* by trees durg minority of eldest survg son]. 2nd *Testatum*, &c., sd A., as settlor, Doth Assign unto sd C. and D., thr exs, &c., ALL AND SINGULAR the lands and tenmts demised by Indres of Lease described in Schedule hto,

To HOLD the same unto sd C. and D. thr exs, &c., for resue unexped of respive terms, subjt to rents and covts, &c., UPON TRUST for sd A. till mrrge, and afterwards UPON TRUST that sd C. and D. shall, out of rents and profits throf, pay rents and pform covts, and subjt thrto hold same upon such trusts and subjt to such powers and provons as shall correspond, as nrly as thr nature pmits, with those hinbefore decld concerng freeholds hby settled, but so that sd leasehold premes shall not vest absoly in any pon hby made tenant in tail male by pchase, unless he attains 21, but on his dth thrunder shall devolve as if pt of freeholds of inheritance hby settled. *Agreemt* that C. and D. be trees of these presents for pposes of S. L. A. *Proviso* avoidg Settlemt if no mrrge within 12 months. IN WITNESS, &c.

Sufficient of the language in shortened form is here set out to show the general drift of the settlement. As to *freeholds*, it is seen to be a Grant to Uses operating under the St. of Uses, and (1) vesting by way of Resulting Use the fee in A. till marriage, and afterwards by way of Springing Uses; (2) a Rent-charge in B. for pin-money during coverture; (3) an increased Rent-charge for Jointure for her life after A.'s death; (4) a life estate in A.; (5) a Long Term vested in C. and D. as security for *portions*, and preceding the inheritance; (6) Remainders in tail male to the first and other sons of A. and B. in order of seniority; and (7) Ultimate Remainder in fee to A. The rest is subsidiary

matter for working out these limitations in detail. Pin-money and Jointure were, before 1883 (and still may be), secured by another long term (*e.g.*, of ninety-nine years), vested in the same or different trustees. But this is now needless, as by M. W. P. A. the wife can take the *legal* estate in a rent-charge. As to *leaseholds*, this part of the settlement is a C. L. deed of assignment, the assignees taking the property on trust. If no fresh settlement is executed, it will, so to speak, wear itself out within due time. Suppose A. and B. have a son E., he is tenant in tail by *purchase* under the settlement (*b*), and on his attaining twenty-one, the leaseholds vest absolutely in him, in remainder if A. is living, in possession if A. is not.

If E. attains twenty-one in A.'s lifetime, he and A. will very probably decide to *re-settle*, making E. tenant for life in remainder after A., and E.'s hypothetically future sons tenants in tail. For which purpose E. will first of all *disentail* with concurrence of A. The Disentailing Assurance will run thus :—

Date and *Parties* (E., *tenant in tail*, of the 1st pt, A., *protector*, of the 2nd, F., *grantee to uses*, of the 3rd). *Recitals* (previous settlemt, and any subsequent dealings with ppy. Desire of E. and A. to bar este tail and

(*b*) *v.* p. 36.

subseqt estes). *Testatum* (in pursuance of such desire and conson of premes) sd E. with consent of sd A. hby testified Doth by this deed intended to be enrolled in C. O. pursuant to St, Grant unto sd F. in fee simple ALL AND SINGULAR lands, &c., comprised in sd Indre of Settlemt, or of wh sd E. is now by any means tenant in tale male at law or in eqy by virtue of sd Indre of Settlemt, To HOLD the same UNTO sd F., SUBJT to (all uses, estes, incumbrances, if any, recited, and powers annexed thrto precedg este tail), BUT FREED and Discharged from all estes in tail and all remers, estes, and powers thrafter. To SUCH USES, Trusts, Powers, and Provons as sd E. and A. shall hrafter by deed with or witht power of revocon and new appmt jtly direct or appt. AND IN DFLT of and subjt to such appmt, To THE USES, Trusts, Powers, and Provons wh under sd Indre of Settlemt are subsistg or capable of takg efft, and so as to restore and confirm the same. IN WITNESS, &c.

Indentures *inter partes* are far commoner than Deeds Poll made by one party only. We conclude with a specimen of the latter, being an Appointment by A. under power in above Settlement to a younger child, G.

To ALL TO WHOM THESE PRESENTS SHALL COME, A., of ———, sends greeting. WHAS by an Indre, &c. (recitg so much as concerns the power of appt). AND WHAS there have been issue of sd mrrge ——— children, &c. AND WHAS G., one of such younger children (*e.g.*, has attained twenty-one, or is about to be married, &c.)

and sd A. is therefore desirous of apptg pt of sd sum of £——— in favour of sd G. in manner hinafter appearg. NOW THESE PRESENTS WITNESS, that in psuance of such desire sd A. Doth hby, in exercise of sd power and of every or any other power in this behalf him enablg, irrevocably appt that (if sd mrrge take place within ——— months, &c.) the sum of £——— part of sd sum raisable as afsd shall immediately be vested in sd G., and payable to sd G., exs, &c., upon dth of sd A. with intt at rate of £——— p.c.p.a. from his dth till payment throf. IN WITNESS, &c.

The above is an *irrevocable* Appointment. But such a deed under some circumstances might witness to *partial revocation* of previous appointment, and secondly to *new appointment*, with proviso that it shall be lawful hereafter by deed to revoke wholly or partially the present appointment, and to declare new uses or trusts within the limits of the original power.

TABULAR ANALYSIS.

Ownership (Right *in rem*) **of Property** . . . } { I. Primary.
II. Subsidiary to right *in personam*,
Mortgage—1. Legal.
2. Equitable.

Property . I. Real.—Lands, Tenements, and Hereditaments.
a. Corporeal.
b. Incorporeal...i. Appendant.
ii. Appurtenant.
iii. In gross.

II. Personal—Goods and Chattels.
(3) Mixed.
(4) Notional.

I. REAL...1. As to Tenure—(1) Free.
a. Knight Tenure.
b. Free Socage.
(2) Base (Copyholds).

2. As to *quantity* of Estate. (1) Life.
a. Of grantee.
b. Of another (*pur autre vie*).
(2) Of Inheritance.
a. In tail.
b. Fee Simple.

3. As to *quality*. (1) In Severalty.
(2) In Community.
a. Joint Tenancy.
b. Tenancy in Common.
c. Coparcenary.
d. Tenancy by Entireties.

I. REAL...3. As to *quality—continued.*

Or (1) In Possession.

a. Actual Seisin.

b. Right of Entry.

(2) In Expectancy.

a. Reversion.

b. Remainder.

i. Vested.

ii. Contingent.

c. Executory Interest.

i. Executory Devise.

ii. Springing and Shifting Uses.

4. (1) Legal } (2) Equitable } { *a.* By direct transmission. *b.* By indirect transmission—Powers—i. C. L. ii. Equitable. iii. St. of Uses. iv. Other Statutes.

II. PERSONAL...Chattels, REAL—1. Tenancy at Will.

2. Tenancy at Sufferance.

3. Term of Years.

Investitive Facts of Ownership...1. Operation of Law.

a. At Death—Devolution.

b. Inter vivos—Limitation and Prescription.

2. Act of Parties.

a. At Death—Will.

b. Inter vivos — Conveyance.

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[N.B.—"Short titles," under recent statutory provisions, are gradually taking place of older citation by year of reign and chapter. The beginner is advised in the first instance to make himself well acquainted with the subjects and effect of Sts. of Uses, Frauds, Distribution, Mortmain Acts, Inheritance Act, R. P. L. A., W. A., L. P. A. A., R. P. A., J. A., V. P. A., C. A., S. L. A., and L. T. A.]

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